Petition

Office Supreme Court, U.S.
FILED
AUG 20 1981
STEVAS,
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81-336

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

CONSOLIDATED RAIL CORPORATION, *Et Al., Petitioners,*

v.

INTERSTATE COMMERCE COMMISSION,
Et Al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HARRY N. BABCOCK
P.O. Box 6419
Cleveland, Ohio 44101
(216) 623-2200

RICHARD W. KIENLE
8 N. Jefferson St.
Roanoke, Va. 24042
(703) 981-5139

MICHAEL BOUDIN *
JENNIFER L. MACHLIN
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6134

CHARLES E. MECHEM
1138 Six Penn Center Plaza
Philadelphia, Pa. 19104
(215) 977-5017

Attorneys for Petitioners

* *Counsel of Record.*

August 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

In this case, the petitioner railroads filed tariffs with the ICC to continue carriage of spent nuclear fuel and other radioactive materials only in special trains, and they introduced substantial evidence showing that special trains reduce both the risk and severity of rail accidents that could result in the release of catastrophic amounts of radioactive materials. After the ICC disapproved the special train tariffs, the Court of Appeals sustained the agency action on the novel ground that the railroads had failed to rebut a presumption against the tariffs, formulated for the first time on judicial review, and had failed to disprove statements in an earlier environmental impact statement, which was not introduced in evidence by any party.

The question presented is whether, when a court of appeals formulates a new rebuttable presumption or burden of proof requirement on judicial review after the trial court or agency proceeding has been completed, the party subjected to the presumption or burden is entitled to a remand under decisions of this Court (*e.g.*, *Morgan* v. *United States, 304 U.S. 1 (1938); Rosenblatt* v. *Baer*, 383 U.S. 75 (1966)), so that a fair opportunity is afforded to meet the newly announced proof requirements before a final decision is rendered?[1]

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[1] The railroads seek summary reversal on this issue because of the direct conflict between the decision below and decisions of this Court. If plenary review is instead granted, the railroads reserve the right to argue in addition that the proof requirements are not justified by law.

LIST OF PARTIES

The parties to the proceeding in the Court of Appeals include the railroads,[2] certain utilities and manufacturers,[3] and the Interstate Commerce Commission and the United States. The names of parents, subsidiaries, and affiliates of the petitioner railroads are set forth in the attachment to the railroads' application for an extension of time previously filed in this case.

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[2] The Akron, Canton & Youngstown Railroad Company; The Baltimore and Ohio Railroad Company; Bangor and Aroostook Railroad Company; Bessemer and Lake Erie Railroad Company; Boston and Maine Corporation, Robert W. Meserve and Benjamin H. Lacy, Trustees; Central Vermont Railway, Inc.; The Chesapeake and Ohio Railway Company; Consolidated Rail Corporation; Delaware and Hudson Railway Company; The Detroit and Toledo Shore Line Railroad Company; Detroit, Toledo and Ironton Railroad Company; Grand Trunk Western Railroad Company; The Long Island Railroad Company; Maine Central Railroad Company; Norfolk and Western Railway Company; The Pittsburgh and Lake Erie Railroad Company; Richmond, Fredericksburg and Potomac Railroad Company; and Western Maryland Railway Company.

[3] Commonwealth Edison Company; Exxon Nuclear Company, Inc.; General Electric Company; GPU Service Corporation; Houston Lighting and Power Company; Kansas City Power and Light Company; Kansas Gas and Electric Company; Niagara Mohawk Power Corporation; Northern States Power Company; Pacific Gas and Electric Company; Pennsylvania Power & Light Company; Philadelphia Electric Company; Power Authority of the State of New York; Public Service Company of Indiana, Inc.; Rochester Gas and Electric Corporation; Southern California Edison Company; Union Electric Company; Vermont Yankee Nuclear Power Corporation; Virginia Electric and Power Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Consolidated Rail Corporation and the other railroads listed at p. i, n. 2, above, petition for review and summary reversal of the decision of the Court of Appeals in this case.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 646 F.2d 642 and appears at Pet. App. 1a.[1] The court's

[1] References to Pet. App. are to the appendices to this petition. The reported version reflects a subsequent amendment separately reprinted at Pet. App. 1b.

order amending the decision is not officially reported and appears at Pet. App. 1b. The decision of the Commission is reported at 362 I.C.C. 756 and appears at Pet. App. 1d. An order of the Commission modifying that decision is not officially reported and appears at Pet. App. 1e.

JURISDICTION

The decision of the Court of Appeals which constitutes its judgment in this case was entered February 26, 1981. A timely petition for rehearing and suggestion of rehearing *en banc* was denied by orders entered on April 3, 1981, which appear at Pet. App. 1b and 1c. On June 19, 1981, Mr. Chief Justice Burger extended the time to petition for certiorari to and including August 31, 1981. This Court has jurisdiction to review the decision below under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Fifth Amendment to the U.S. Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. Special Train Service

For a number of years, railroads in the United States have required that spent nuclear fuel and other radioactive materials be carried only in special trains devoted solely to such shipments.[2] Spent fuel and other

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[2] Spent fuel, the principal commodity, includes irradiated nuclear fuel assemblies or rods that have been removed from nuclear reactors. Other radioactive waste includes residues and contaminated items such as tools.

high-level radioactive waste are shipped in specially designed casks loaded on railroad cars, and a single cask containing spent fuel has been estimated by the ICC to contain approximately 10 million curies of radioactivity.

As the court below acknowledged, "[t]ransporting spent nuclear fuel is potentially dangerous, since a train derailment, collision, sabotage, or terrorism could result in lethal and environmentally destructive radioactive leakage." Pet. App. 3a. In Congressional testimony, a witness estimated that destruction of a fuel cask in a dense urban area could produce hundreds of early cancer deaths and subsequent latent cancer deaths of tens or even hundreds of thousands of people. The witness stated:

> "There could be upwards of 1600 early deaths following an attack [on a cask car] and upwards of 11,000 latent cancer deaths. New York City's Bureau of Radiation Control projected 1300 early deaths and upwards of 169,000 latent cancer deaths." *Hearings on S. 535 Before the Subcommittee on Science, Technology, and Space,* 96th Cong., 1st Sess. 189 (1979) (testimony of Mr. Pollack).

The casks are specially designed pursuant to Government regulation to withstand specified stresses, including those equivalent to a 30 mile per hour impact against a flat surface, a 12 mile per hour impact against a rod or sharp protrusion, exposure for 30 minutes to very high temperature, and immersion in 3 feet of water for 8 hours.[3] However, the forces unleashed in a railroad accident can, as expert evidence confirmed in this case,

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[3] The standards are set forth at 49 C.F.R. § 173.398(c)(2). The 30 and 12 mile per hour equivalencies were established by railroad evidence (1 J.A. 62) and were not rebutted. References to J.A. are to the Joint Appendix in the court below.

readily exceed these design limits. Regular trains, for example, often exceed 50 miles per hour and fires of several hours duration are not unknown in rail accidents. I J.A.62. In addition, railroads are forced to contend not only with accident but with deliberate track obstruction and even criminal sabotage. I J.A. 22-23.

In the face of these risks, the railroads concluded some time ago that special trains would reduce the chance of accidents occurring, limit the risk that an accident would exceed the design limits of the cask, and diminish the threat that a release of radioactivity would occur in a densely populated area. I J.A. 65-67. Special trains, which are limited to five cask cars and buffer cars, can easily be restricted in speed to 30 miles per hour and can be specially routed to avoid dangerous track, high traffic areas, switching yards, and densely populated areas. I J.A. 72-73. Cars including other combustible or explosive cargoes are automatically excluded from special trains. Such trains can be given special crews and continuing surveillance instead of reduced attention a single car necessarily receives when it is operated as part of a freight train that may include over 100 cars. I J.A. 70-75. From 1975, such shipments uniformly were made only in special trains.

Until recently, the Eastern railroads — petitioners in this case — transported such radioactive materials solely on a contract basis rather than under tariff.[4] The Commission in 1978 directed the Eastern railroads to file tariffs for transportation of such radioactive materials.[5]

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[4] In the South and West, the railroads offered service on both a contract and tariff basis; but in each instance only special train service was offered.

[5] See *U.S. Energy Research and Development Administration* v. *Akron, C. & Y.R.R.*, 359 I.C.C. 639 (1978), *aff'd sub nom.*

In affirming the Commission, the Sixth Circuit made clear that tariffing and special trains were two separate questions and that, "after the [railroads] . . . published tariffs under which special trains would be required to haul" spent fuel and radioactive waste, the Commission should then consider the question whether special trains were properly required. 611 F.2d at 1169.

The Eastern railroads filed such tariffs for carriage of radioactive material. The tariffs continued the established requirement that special trains be utilized. After an initial suspension, the Commission allowed the tariffs to become effective in 1979. It also began a new investigation, which is the origin of the present case, to determine whether the special train requirement was appropriate and, as a corollary, whether the higher costs of providing special train service were properly reflected in the tariff rates.[6]

B. Proceedings Below

In the agency proceeding below, the railroads took the initiative of presenting evidence, although the burden of proof to attack the tariffs was upon the protesting shippers, as the Commission admitted. Pet. App. 3d. Dr. Harris, Vice President of the Association of American Railroads in charge of its Research and Test Department, described the cask design limits and the prospect that a rail accident could easily exceed those design

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Akron, C. & Y.R.R. v. *ICC*, 611 F.2d 1162 (6th Cir. 1979), *cert. denied*, 101 S. Ct. 97 (1980).

[6] The two questions both turned on whether special trains contributed to increased safety. No one seriously argued that special trains should be disallowed if they did contribute to safety or that special train rates were too high if special train costs were appropriately included.

limits; he pointed out, for example, that fires well over 30 minutes occur in rail accidents and that the Government's own test showed that a cask subject to fire had become "molten, leaving unshielded areas, in less than two hours," even though the cask was empty and therefore not exposed to internal heat that would hasten the melting process. I J.A. 62-63. Conrail's Operating Vice President, who had inspected numerous derailments and had studied hundreds of accident reports, stated:

> "In the event of an accident [involving nuclear material] the scope and extent of the consequences, expenses and damages that could result would be far greater than those involved in transporting any other type of freight. . . . If, for example, a train carrying spent fuel side-swiped or collided with another train carrying propane, naphtha, LPG or other flammable or explosive commodities the foreseeable range of nuclear contamination could cover several square miles." I J.A. 71.

There was testimony from Conrail's chief security officer concerning track obstructions, vandalism and criminal activity (I J.A. 22-24); by a railroad radiation expert (I J.A. 26-30); and by the Chessie System's general superintendent of transportation, a man with 36 years of experience in railroad operations. I J.A. 51. Advantages of special train service, including lower speeds, safer routing, greater surveillance, and the exclusion of dangerous cargo, were the subject of extensive testimony by the railroads.[7] See, *e.g.*, I J.A 27, 55, 62-67, 72-73.

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[7] The Commission summarized the safety advantages of special train service foreseen by the railroads as follows:

> "(1) reduced running speed; (2) reduced switching and less movement in yards; (3) increased ability to control speed, acceleration and deceleration; (4) shorter total transit time because of less switching and avoidance of yards; (5) reduced mass of the train; (6) the stopping of one train to permit an-

Although the burden of proof was on the protesting shippers, they chose to introduce virtually no safety evidence. They relied instead on the proposition that the prescription of minimum cask standards by other Government agencies deprived the Commission of authority to consider whether special train service enhanced safety.[8] In any event, special trains — with lower speeds, safer routing, greater surveillance and the exclusion of other dangerous cargo — could not fail to enhance safety, so it is not surprising that protesting shippers chose to rely on their "jurisdictional" argument, an argument ultimately rejected by both the Commission and the lower court.

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other to pass; (7) the noninclusion in special trains of hazardous materials, particularly combustibles and explosives; (8) special routing to avoid bad trackage, high-population areas, and freight yards where cars containing other hazardous materials, including combustibles and explosives, may be present; (9) increased opportunity for observation and control by train crews due to the shorter length of the special train, lower noise levels, and lower dust levels; (10) the general tendency of train crews to be alerted to the special need for caution on special freight trains; (11) the presence in special trains of only the best rolling stock; (12) reduced free slack in the train, which lessens shock loads due to run-in and run-out; (13) reduced tendency to cause failure in the track structure; (14) reduced likelihood of coupler failure and trainline air hose failure; (15) reduced time of train in grade crossings; (16) elimination of hazards of derailment possibilities caused by other cars in train; and (17) reduced exposure of employees to radiation present even in a perfectly operating cask." Pet. App. 16d.

[8] Although the Commission and the lower court decisions refer to shipper testimony on safety, both references (Pet. App. 8, 764) are to the testimony of two retired railroad employees (I J.A. 88 and 115), who merely asserted that they had not encountered any prior situation in which special train service was required for cars of normal weight and dimension. The principal witness, whose testimony was adopted by the other witness (I J.A. 117), stated that he did not intend to discuss the safety advantages of special train service because of "my understanding that the issue of safety is not here

The Commission's own Rail Public Counsel, an independent affiliated office, intervened in the case. It observed:

> "The railroads presented some credible evidence that the use of special trains together with operating restrictions and inspections, would tend to reduce the risk of an accident involving radioactive waste . . . [and] to suggest that there could be an accident in the rail transportation of the spent fuel that would exceed in severity the design requirements of the spent fuel cask. . . . Thus, on the present record, it would be difficult to find that protestants [shippers] have met their burden." RPC Mem. 8.

The Rail Public Counsel concluded that "only one outcome is possible." *Id.*

C. The Decisions Below

In its decision, the Commission acknowledged that it had authority to consider whether special trains enhanced safety (Pet. App. 5d),[9] and it admitted that the railroads had substantial latitude in determining their own operating procedures. Pet. App. 18d. However, without even addressing the safety advantages outlined in the railroad evidence, the Commission concluded that special trains were not warranted. It relied in part on the testimony of the two shipper witnesses previously re-

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involved." I J.A. 91. Neither witness purported to address, let alone refute, the specific safety advantages of special train service described by the railroads.

[9] The conclusion is unassailable, and is supported both by the Sixth Circuit (see 611 F.2d at 1170) and the lower court in at least two cases. See Pet. App. 18a-19a. Nothing in the cask design specifications prescribed by other agencies prohibits or is inconsistent with the use of *other* types of safety precautions, including special railroad operating practices.

ferred to (p. 7, n. 8, above) and in part on an environmental impact statement which the Commission had prepared in connection with earlier proceedings but which had *not* been introduced in evidence in this case or even relied on significantly by the protestants. Pet. App. 17d-18d.[10]

On judicial review under 28 U.S.C. §§ 2341-50, the District of Columbia Circuit affirmed the Commission upon a novel ground. It held that the cask design standards established by other agencies created a rebuttable "presumption" that special trains were unnecessary for safety purposes, and the court then ruled that "[s]ince the railroads failed to present evidence sufficient to rebut that presumption, we believe that the Commission acted properly in finding on this record that [special train service] was unnecessary as a safety measure . . . ." Pet. App. 31a. It treated the Commission's environmental impact statement in similar fashion, ruling that it imposed a special burden on the railroads "to contest" and "to undermine" the EIS assertions. Pet. App. 28a-29a.[11]

The railroads petitioned for rehearing, pointing out that the lower court's own rationale for affirmance clearly required a remand instead. The petition showed that under decisions of this Court, as well as the courts of appeals, it is a well established principle of due process that a remand is required where a new proof require-

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[10] There were good reasons why the EIS had not been introduced or relied upon, including its outdated character, the failure of the Commission to update the statement, numerous technical flaws in the statement, and superseding evidence on important points. See pp. 14-15, below.

[11] The court described in detail the factual showing it thought the railroads should make in order to overcome the new presumption created by the cask standards and to undermine the EIS. Pet. App. 20a-22a.

ment is crystallized for the first time on judicial review. The railroads pointed out that the adversely affected party is clearly entitled to an opportunity on remand to meet a new presumption or burden of which it was unaware at the time of the hearing. Without explanation, the lower court denied the petition for rehearing. Pet. App. 1b. The suggestion of rehearing *en banc* was denied with one judge dissenting. Pet. App. 1c.

REASONS FOR GRANTING THE WRIT

The decision below is contrary to requirements of due process long recognized by this and other courts, and is directly inconsistent with *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966). Where, as here, a new proof requirement is established for the first time on judicial review after the hearing is completed, the burdened party is entitled to a remand so that it is afforded an opportunity to provide the newly required proof. This obligatory remand reflects the broader constitutional concept that a fair hearing requires not only the right to present evidence but also the right to know at the evidentiary stage what one is required to prove or disprove. *Morgan* v. *United States*, 304 U.S. 1 (1938).

The lower court's disregard of the *Morgan-Rosenblatt* requirement is so patent that summary reversal is justified in this case to provide the railroads with a fair chance to meet the proof requirement articulated for the first time by the lower court. That opportunity is especially warranted in this case, because full protection of the public against radioactive dispersal in a rail accident is extraordinarily important. Since virtually all of the evidence in the record shows that special trains do enhance safety, the prospect that the railroads would

prevail on remand is substantial although even a mere "possibility" is sufficient under *Rosenblatt*.

1. No requirement of procedural due process is more firmly rooted than the right of a party to know, at the time evidence is being presented, what it must prove or refute in order to prevail. As this Court explained in *Morgan* v. *United States:*

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be a barren one." 304 U.S. at 18.

Without this opportunity, litigation is little more than a game of blind man's bluff.

This constitutional requirement has been recognized repeatedly by decisions of this Court[12] and by the lower federal courts.[13] It has been applied where the basic Government claims in a rate proceeding were not clearly articulated at the outset (*Morgan*); where an applicant was disqualified for a position or license on grounds not adequately stated and therefore not open to effective refutation (*Willner, Freitag*); where a new theory of liability was adopted after the agency record was closed, and refuting information could no longer be introduced (*Rodale*); and where, as here, a new proof requirement was crystallized for the first time on appellate review after the trial was completed (*Rosenblatt*).

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[12] *E.g., Morgan* v. *United States, supra; Rosenblatt* v. *Baer, supra; Willner* v. *Committee on Character,* 373 U.S. 96 (1963).

[13] *E.g., Ostrowski* v. *City of New York,* 601 F.2d 629, 631 (2d Cir. 1979); *Freitag* v. *Carter,* 489 F.2d 1377, 1382 (7th Cir. 1973); *Rodale Press, Inc.* v. *FTC,* 407 F.2d 1252 (D.C. Cir. 1968).

In *Rosenblatt,* a county employee obtained a libel judgment based on a defamatory newspaper article. During appeal, this Court decided in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), that libel judgments against "public officials" required a showing of actual malice or reckless disregard of truth. The plaintiff in *Rosenblatt* had not tried to prove malice or reckless disregard, or to show that he was not a "public official," since at the time of the trial *New York Times* had not been decided and no such proof requirements were known to the plaintiff. Citing *New York Times,* this Court reversed the judgment in plaintiff's favor but, recognizing "the possibility" that the plaintiff "could have adduced proofs" consistent with the *New York Times* requirements, the Court remanded the case for a new trial to provide plaintiff that opportunity. 383 U.S. at 87-88.

The common thread that runs from *Morgan* through *Rosenblatt* and *Willner,* as well as through the Court of Appeals cases applying the same principle, is one of common sense: a meaningful opportunity to present one's case requires fair warning of what one is supposed to prove or disprove. If the warning comes after the record is closed, then the record must be reopened. When a new presumption or burden of proof is announced for the first time on appellate review, a remand to provide that opportunity is essential if there is any "possibility" that the burden could be carried or the presumption refuted.

2. In this case, the lower court's decision rested centrally on its newly announced "presumption" and burden of proof. Based on the agency regulations specifying cask design requirements, the lower court announced a rebuttable "presumption" that special trains were un-

necessary and stated that the railroads were obliged to "present[ ] . . . evidence rebutting the presumption." Pet. App. 20a. The Court offered examples of showings that the railroads might have made to overcome the presumption but emphasized that "[n]o such rebutting evidence . . . was presented in this case." *Id.* The lower court also said that the earlier ICC environmental impact statement (not introduced as evidence in this case) imposed a burden of proof on the railroads "to contest any and all data underlying the conclusion contained in the EIS" and to provide "new, persuasive evidence . . . to undermine the Commission's previously shown reliance upon the EIS." Pet. App. 28a-29a.

It is clear that the lower court relied both on the presumption and on the failure to "undermine" the EIS. Summarizing its conclusion, the court below stated that the Commission had acted properly in finding special train service unnecessary "[s]ince the railroads failed to present evidence sufficient to rebut [the] presumption" based on the cask specification regulations. Pet. App. 31a. As to the EIS, the Commission referred to it as "[t]he primary evidentiary foundation for the Commission's finding" that special train service was not reasonably necessary. Pet. App. 24a.

The railroads had no notice at the time of the Commission hearing that either type of proof was required for them to prevail. Indeed, under long-standing precedent (acknowledged by the Commission), the entire burden of proof lay upon the protestants to establish that special train service was unnecessary. Pet. App. 3d. No one ever suggested prior to the hearing that the cask regulations gave rise to a presumption the railroads needed to overcome; and the Commission itself was clearly

unaware of any such presumption since it did not rely upon it in its own decision.[14]

Similarly, the railroads had no reason to think that they were required to "contest" the data in the EIS or "undermine" its factual assertions. The EIS had been prepared in earlier proceedings based on data at least three to five years old; it was not updated by the Commission in this case; and no party sought to introduce the EIS in evidence. The railroads were entitled to assume that the evidence introduced in this case would constitute the record for decision, and they introduced extensive direct evidence to support their position that special trains enhance safety. They had no reason to suppose that they were also required to refute statements in an earlier EIS which the protesting shippers themselves did not even introduce as evidence in this case.[15]

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[14] In fact, the presumption is an illogical compromise struck by the lower court. The private shippers had wrongly claimed that the Commission had no jurisdiction to examine safety save to assure itself that the cask requirements had been met; the railroads argued (and the Commission ultimately agreed) that the Commission could decide whether special train service enhanced safety by providing useful protection over and above the cask requirements. Since the operating practice is not inconsistent with the cask requirement but builds upon it, the adverse presumption makes no sense. In any case, whether or not illogical, the presumption certainly was not anticipated by anyone.

[15] The lower court said that the Commission had given notice at the time the EIS was prepared in earlier proceedings that it was "generic" and could be used by the Commission in any proceeding involving special trains. Pet. App. 27a. At most, this is a warning that the Commission might choose not to prepare another EIS to satisfy its obligations under the National Environmental Policy Act; it is certainly not a warning that the specific factual assertions in the EIS, not expressly relied upon by any party in this subsequent proceeding, would — unless refuted in a particular way — constitute a substitute evidentiary record to resolve the merits in the subsequent case.

There exists more than a "possibility" (*Rosenblatt*) that the railroads could meet the proof requirements created by the lower court's presumption based on the regulations and the burden of proof based on the EIS. Indeed, the lower court admitted that "the ICC could be presented with evidence rebutting the presumption." Pet. App. 20a. As to the EIS, when the Commission's brief in the Court of Appeals relied heavily upon it, the railroads in turn described to the Court of Appeals — merely as examples — six major flaws undermining the EIS, quite apart from its generally outdated character; and the Court of Appeals did not suggest that the railroads were mistaken in any one of their attacks.[16]

3. Several other considerations strongly reinforce review in this case. This Court has repeatedly recognized its special role and responsibility to assure due-process fairness in federal agency and judicial proceedings. It has done so both in cases involving the *Morgan - Rosenblatt* principle of fair notice and in many other contexts. Such procedural standards affect far greater numbers of cases in the agencies and lower courts than individual substantive rules and they are therefore especially appropriate for Supreme Court review.

Next, this is a case in which a controlling decision of this Court has been ignored by the lower court. Al-

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[16] See R.R. Br. 42-44 in the Court of Appeals. For example, the EIS assumed that in a radiation accident, the population within a half mile radius could be evacuated within one hour, a manifest absurdity in the average city where there may be over a hundred thousand persons per square mile. The EIS ignored the cumulative effect of multiple impacts where a series of cars in a regular train smash against a derailed cask car. The EIS assumed that casks could withstand fires far longer than the 30-minute test limit, whereas a more recent Government test showed that a fire of several hours did melt the cask shielding. *Id.*

though the *Morgan* and *Rosenblatt* decisions were called to the lower court's attention, there is no discussion of either case nor any attempt to distinguish them. Yet *Rosenblatt* is as closely in point as a case can be. No stronger basis for certiorari can be imagined than direct disregard by a lower court of a governing decision of this Court. There is also a conflict between the decision below and cases in other circuits (see p. 11, n. 13, above) applying the remand requirement.

The substantive issue involved in this case is a further reason for review. The consequences of a rail accident involving a major release of radioactive material would be so serious that no safety precaution can be ruled out of order without the most thorough examination. See p. 3, above. Since the Commission's decision does not discuss or refute any of the advantages of special train service listed by the Commission itself (Pet. App. 16d), it can hardly be treated as any examination at all. Yet the characteristics of special train service — *e.g.*, assured slower speed, avoidance of yards and bad track, exclusion of dangerous cargo — are, *prima facie*, steps likely to enhance safety.

The railroads in this case are not asking this Court to rule that special trains are necessary: they are asking only for an opportunity to make that showing in a remanded proceeding before the Commission, in accordance with the new proof standards outlined in the Court of Appeals' own decision. The lower court recognized that such a showing was possible. See p. 15, above. Unless a remand is afforded, the public will be deprived of the protection of special train service and the railroads will be threatened with multi-million dollar

claims for reparations because of their provision of this service in the past.[17]

This is a case in which summary reversal is appropriate because of the direct conflict with *Rosenblatt.* Not long ago, this Court in *Conrail* v. *NARI,* 101 S.Ct. 775 (1981), summarily reversed and remanded a decision of the District of Columbia Circuit which had ignored the controlling decision of this Court on the scope of injunctive relief permissible in railroad rate cases.[18] In this case, the conflict between the lower court's refusal to remand and the *Morgan-Rosenblatt* line of authority is no less direct and no less egregious. If summary reversal is not afforded here, then the case should be set for briefing and argument in view of the conflict with decisions in this Court and other circuits, the elemental unfairness of the result to the litigants, and the potential consequences to the public of diminished protection against a nuclear accident.

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[17] Relying in part on the decision below in this proceeding, the Commission has only recently awarded such reparations on the premise that special train service provided no useful protection. See *U.S. Department of Energy* v. *Baltimore & O.R.R.,* 364 I.C.C. 951, 953 (1981), *petitions for review pending sub nom. Conrail* v. *ICC,* No. 80-1804, *et al.,* D.C. Cir.

[18] See also *SEC* v. *Otis & Co.,* 338 U.S. 843 (1949); *FCC* v. *Broadcasting Service Organization,* 337 U.S. 901 (1949).

CONCLUSION

For the reasons stated, certiorari should be granted and the decision below should be summarily reversed on the authority of *Morgan* and *Rosenblatt*. In the alternative, certiorari should be granted and the case should be set for briefing and oral argument.

Respectfully submitted,

HARRY N. BABCOCK
P.O. Box 6419
Cleveland, Ohio
44101
(216) 623-2200

MICHAEL BOUDIN *
JENNIFER L. MACHLIN
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6134

RICHARD W. KIENLE
8 N. Jefferson St.
Roanoke, Va. 24042
(703) 981-5139

CHARLES E. MECHEM
1138 Six Penn Center Plaza
Philadelphia, Pa. 19104
(215) 977-5017

Attorneys for Petitioners

August 1981

* *Counsel of Record.*

APPENDIX A

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

80-1709

CONSOLIDATED RAIL CORPORATION, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

COMMONWEALTH EDISON COMPANY, ET AL.,
GENERAL ELECTRIC COMPANY,
GPU SERVICE CORPORATION, ET AL., INTERVENORS

On Petition for Review of an Order of
the Interstate Commerce Commission

Argued December 4, 1980

Decided February 26, 1981

Michael Boudin with whom *J. Mark Ivey*, *Harry N. Babcock* and *Richard W. Kienle* were on the brief for petitioners.

Joseph H. Dettmar, Attorney, Interstate Commerce Commission with whom *Sanford M. Litvack*, Assistant Attorney General, Department of Justice, *Richard A. Allen*, General Counsel, *Henry F. Rush*, Associate General Counsel, Interstate Commerce Commission, *John J. Powers, III*, and *James Laskey*, Attorneys Department of Justice

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

were on the brief for respondents. *Robert S. Burk* and *H. Glenn Scammel*, Attorneys, Interstate Commerce Commission, also entered appearances for respondent, Interstate Commerce Commission.

Harry H. Voigt with whom *Leonard M. Trosten* and *Michael F. McBride* were on the brief for Intervenor, Commonwealth Edison Company, et al.

Donald Macleay and *James F. Bromley* were on the brief for intervenor, General Electric Company.

Charles J. McCarthy was on the brief for Intervenor, GPU Service Corporation, et al.

Before: ROBINSON and WALD, *Circuit Judges*, and JUNE GREEN*, *United States District Judge* for the District of Columbia

Opinion for the Court by *Circuit Judge* WALD.

WALD, *Circuit Judge*: Petitioner railroads[1] seek judicial review of certain orders of the Interstate Commerce Commission[2] ("ICC" or "Commission") concerning railroad rates

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* Sitting by designation pursuant to 28 U.S.C. § 292(a)

[1] The same railroads that are petitioners in this review proceeding participated in the proceeding below. They are: The Akron, Canton & Youngstown Railroad Co.; The Baltimore & Ohio Railroad Co.; Bangor and Aroostook Railroad Co.; Bessemer & Lake Erie Railroad Co.; Boston & Maine Corp., Robert W. Meserve and Benjamin H. Lacy, Trustees; Central Vermont Railway, Inc.; The Chesapeake & Ohio Railway Co.; Consolidated Rail Corp.; Delaware & Hudson Railway Co.; The Detroit & Toledo Shore Line Railroad Co.; Detroit, Toledo & Ironton Railroad Co.; Grand Trunk Western Railroad Co.; The Long Island Railroad Co.; Main Central Railroad Co.; Norfolk & Western Railway Co.; The Pittsburgh & Lake Erie Railroad Co.; Richmond, Fredericksburg & Potomac Railroad Co.; and Western Maryland Railway Co.

[2] The principal order of the ICC under review here is entitled Trainload Rates on Radioactive Materials, Eastern Railroads,

for transporting hazardous radioactive materials throughout the eastern United States. The Commission found that petitioners' tariffs were based on a special train service which was unnecessary and wasteful and cancelled the petitioners' tariffs, replacing them with prescribed, lower tariffs based on regular trainload service. We hold that the ICC acted properly in determining, on the record before it, that the use of special train service was unnecessary, and we therefore affirm the orders of the Commission.

I. Background

For a number of years, petitioner railroads have transported spent nuclear fuel[3] from nuclear-powered electric generating plants and nuclear-powered vessels to reprocessing plants, waste storage facilities, and commercial burial sites. Transporting spent nuclear fuel is potentially dangerous, since a train derailment, collision, sabotage, or terrorism could result in lethal and environmentally destructive radioactive leakage.[4] For this reason both the Nu-

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362 ICC 756 (Investigation and Suspension Docket No. 9205) (served May 2, 1980) (hereinafter "Eastern Railroads"). Related to this decision are three others, all with the same caption and ICC Docket Number. Their service dates are May 30, 1980; July 17, 1980; and August 13, 1980.

[3] Spent nuclear fuel consists of irradiated nuclear fuel assemblies or rods which have been removed from nuclear reactors after being used to power them. Other, far less radioactive wastes include "closure heads" and "core barrels," which are operational equipment used to handle spent fuel, as well as uniforms, clothing, tools and other material exposed to radioactivity. The railroads have not claimed that the transportation of these other items by regular train service raises a significant safety issue. This case therefore centers only upon the potential hazards of transporting spent nuclear fuel.

[4] It has been estimated that the following effects might result from the successful sabotage of a spent nuclear fuel container:

> [T]here could be upwards of 1600 early deaths follow-

clear Regulatory Commission ("NRC") and the Department of Transportation ("DOT") have required that spent nuclear fuel be transported in agency approved, heavily shielded containers, or "casks," each of which weighs approximately 300,000 pounds and carries a payload of up to approximately 60,000 pounds. *Eastern Railroads*, *supra*, 362 ICC at

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> ing an attack and upwards of 11,000 latent cancer deaths. New York City's Bureau for Radiation Control projected 1300 early deaths and upwards of 169,000 latent cancer deaths. Both figures were based on high population densities typical of about 140 American urban areas.
>
> The penetration of the typical spent fuel cask is deemed credible. It would release radioactive solid material and respirable gases and other radioactive particulate matter. . . . Surface winds and later upper atmospheric winds will disperse the radioactive "plume" or cloud over large distances, contaminating large numbers of people not in the vicinity of the attack. Street caverns, subway tunnels and office buildings can capture and concentrate some of the radioactive materials.

Nuclear Waste Transportation Safety Act of 1979, Hearings on S. 535 Before the Subcommittee on Science, Technology and Space of the Senate Committee on Commerce, Science and Transportation, 96th Cong., 1st Sess., 189 (July 19, 1979) (testimony of Richard Pollack). Mr. Pollack is Director of the Critical Mass Energy Project in Washington, D.C., a consumer organization, and member of an Advisory Task Force to the Sandia National Laboratories which recently completed a study for the NRC of the environmental effects of transporting radioactive materials through urban areas. *See* 46 Fed. Reg. 5299 (Jan. 19, 1981).

See also Verified Statement of Richard B. Hasselman, Senior Vice President, Operations, Consolidated Rail Corp., I J.A. at 71 ("In the event of an accident [involving radioactive materials in rail transit,] the scope and extent of the consequences, expenses and damages that could result would be far greater than those involved in transporting any other type of freight.").

761. *See generally infra* at n.13. According to the ICC, the federal government is currently the only railroad customer making significant shipments of spent nuclear fuel, 362 ICC at 762, and it imposes different railroad safety restrictions[5] on the shipping of its cargo than the NRC and DOT have required for shipments of spent fuel generally. However, the federal government apparently will not remain the sole shipper of spent fuel for long, since the ICC found that "nuclear reactor operators will soon have to make such shipments if they are to continue operating, as their local storage at plant locations is limited." *Id.* at 762-63.

During the 1960s and into the 1970s petitioner railroads maintained a practice of "flagging out," or abstaining from listing in their published tariffs, the rates for carriage of nuclear materials. The railroads did transport such material, however, under specific contractual arrangements with individual shippers.[6] In 1978, the ICC put an end to the

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[5] Evidence in the record indicates that the federal government currently requires that its radioactive material shipments must not be allowed to roll free in switching operations; must keep to a minimum the number of coupling and uncoupling operations; and must have train speed restricted to 35 MPH. *See* Verified Statement of Melvin O. Benson, General Superintendent of Transportation, Chessie System, I J.A. at 53. Shipments of radioactive materials by the Departments of Energy and Defense, however, are exempt by regulation from DOT rules regarding the transportation of radioactive materials, when such shipments are "for the purpose of national security" and are escorted by designated personnel. *See* 49 C.F.R. §§ 173.7(b); 177.806(b) (1979); 46 Fed. Reg. 5312 (Jan. 19, 1981).

[6] The Sixth Circuit has described these private contracts as typically containing the following clauses:

> (1) making service at the will of the carriers;
> (2) limiting the carrier's own liability in case of rail mishaps involving nuclear material;
> (3) obliging the shipper to obtain connecting-line rail service, and
> (4) requiring special train service for the carriage of

railroads' "flagging out" practice, and held that the railroads were "required under their common carrier duty to handle the involved commodities and to publish reasonable and otherwise lawful tariff provisions covering such transportation and . . . their failure to do so violates sections 1(4) and 6(1) of the act and the national transportation policy." *U.S. Energy Research and Development Administration* v. *Akron, Canton and Youngstown Railroad Co.*, 359 ICC 639 (1978), *aff'd sub nom. Akron, Canton & Youngstown Railroad Co.* v. *ICC*, 611 F.2d 1162 (6th Cir. 1979), *cert. denied*, 49 USLW 3246 (October 6, 1980).

To comply with the ICC order, petitioner railroads filed tariffs applicable to shipments of spent fuel. Those tariffs—the ones at issue in this case—were premised on the use of "special train service" (hereinafter "STS").[7] Objections to the STS-based tariffs were filed by electric utilities and other shippers. *See generally* Petitioners' Brief at

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reactor waste. The special trains in this service would comprise less than five cars, and would move only at low speeds over specially designated routes.

Akron, Canton & Youngstown Railroad Co. v. ICC, 611 F.2d 1162, 1168 (6th Cir. 1979), *cert. denied*, 49 USLW 3246 (October 6, 1980).

[7]Special Train Service has the following characteristics: no freight other than spent fuel or radioactive waste is carried; spent fuel is carried within government approved casks which are placed on a flat car with a buffer car placed on either side; other radioactive wastes are shipped in containers in boxcars; the train has a caboose with personnel aboard who can observe the radioactive shipment while in transit; speed is restricted to 35 MPH; and when a special train carrying spent fuel or radioactive waste is passed by another train, one of the trains remains standing while the other train passes at a speed not faster than 35 MPH. *See* ICC Office of Proceedings, Transportation of Radioactive Materials by Rail, Final Environmental Impact Statement 1-8 (service date August 23, 1977) (hereinafter "EIS").

"Certificate Required by Rule 8(c) . . . ," at unnumbered second and third pages (listing of utilities and shippers). By order dated December 8, 1978, the Commission suspended the operation of the tariffs and instituted an investigatory proceeding which produced the principal decision and order now before this court. On March 15, 1979, the Commission changed its mind, vacated the suspension of the STS tariffs, and the tariffs then went into effect; they have remained in effect until today by order of this court. *See* p. 9 *infra*. In the meantime, evidentiary proceedings in the case went forward. Evidence was submitted in the form of written verified statements of witnesses, both on behalf of the railroads and of opposing shipper interests. Although the Commission's customary practice is for an Administrative Law Judge to render an initial decision, in this case the Commission chose to consider the matter *ab initio*.

On May 2, 1980, the Commission held, *inter alia*,[8] that petitioners' published tariffs, based on STS, were unreasonably high, thereby violating 49 U.S.C. § 10701(a). *Eastern Railroads*, *supra*, 362 ICC at 775; *see generally* p. 11 *infra*. The Commission first decided that "safety evidence may be given full probative weight by us without infringement upon the jurisdictional province of NRC and DOT. The safety matters will be considered in our determination of the justness and reasonableness of the initial rates in issue." *Id.* at 759. Then, reviewing the safety evidence before it, the Commission determined that

> All available evidence supports the finding that, especially because of the ability of the casks to withstand stress, use of special trains provides no cognizable safety benefit. . . . [W]e are not prepared to allow respondents to require a service which is several times as costly as regular service

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[8]The Commission went on to decide that it should prescribe a particular rate for regular trainload service for spent fuel. That determination is not an issue in this appeal.

> without (any) commensurate safety benefits. . . . Thus, we (must) find that, based on the evidence at hand, the special train requirement is wasteful transportation and an unreasonable practice in violation of Section 10701(a) of the act.

Id. at 773 (parentheses in original).

The Commission based this factual determination primarily on evidence it drew from its previously issued Environmental Impact Statement (EIS), *see* n.7 *supra*, which specifically addressed the relative safety of STS and regular trainload service for radioactive material. *Eastern Railroads*, *supra*, 362 ICC at 771–73. The Commission declared that "we have strong evidence derived from the EIS that special train service would be for all practical purposes no safer than regular train service." Id. at 773. The Commission supported its safety conclusions by referring to testimony provided by the shippers in the instant proceeding that STS was unnecessary, and by citing a previous ICC decision[9] which rejected STS tariffs for other railroads located in the South and West. *Id.* at 764, 773.

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[9]The Commission cited Radioactive Materials, Special Train Service, Nationwide, 359 ICC 70 (decided March 8, 1978) (hereinafter "Nationwide"), where STS tariffs proposed by southern and western railroad companies for the carriage of radioactive materials were rejected by the Commission. The *Nationwide* opinion stated that shipments of radioactive materials in regular train service met all DOT and NRC safety requirements, and then went on to agree with the Administrative Law Judge—and its staff's conclusions in the EIS—that special trains were not materially safer. *Id.* at 74–75. In an earlier case on a related topic, Radioactive Materials, Missouri-Kansas-Texas Railroad Co., 357 ICC 458 (decided November 8, 1977), the Commission held that the railroads could not refuse to perform their common carrier duty to transport spent nuclear fuel by regular train service on the ground that it was not sufficiently safe, since such service complied with applicable DOT and NRC safety regulations.

Following the ICC's May 2 order, petitioner railroads asked this court[10] to set that order aside. The railroads also sought a stay from the Commission pending judicial review in order to continue special train service and tariffs in the interim, but the ICC Chairman denied the request by order served May 30, 1980. I Joint Appendix (hereinafter "J.A.") at 181.[11] On August 15, 1980, this court stayed the ICC order of May 2, pending judicial review, and ordered the case expedited.

The railroads have argued to this court that the Commission lacks authority to second-guess the railroads' "rational judgment" on an "operational" issue such as the need for STS. Petitioners' Brief at 19–25. Alternatively, they contend that even if the Commission has authority independently to evaluate the need for STS, the Commission's factual conclusion that STS was unnecessary was arbitrary and capricious. The railroads especially criticize the ICC's reliance upon the EIS, asserting that they had no notice that the EIS would be considered, and further claiming that it is unreliable, outdated, and unpersuasive when compared to the evidence which they have submitted.

The intervenor shippers, on the other hand, argue that the Commission's review of the safety evidence was outside its power, not because it engaged in a *de novo* safety determination in derogation of the railroads' operational judg-

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[10] This court's jurisdiction to hear this appeal is based upon 28 U.S.C. § 2342(5).

[11] The Commission served a further order on July 17, 1980, which (1) corrected an error in the May 2 order; (2) briefly deferred the date for filing new tariffs; and (3) reopened the proceedings to evaluate or prescribe further rates for other weights of shipments. *See* I J.A. at 183. The further proceedings contemplated by the Commission are not relevant to this appeal.

ment, as petitioners assert, but rather because it engaged in an examination of safety in derogation of the authority of DOT and NRC. According to intervenors, Congress vested exclusive jurisdiction over the issue in this case—the need for STS transportation of radioactive materials—with the NRC and DOT. The ICC's role was limited, they contend, to deciding whether its sister agencies had mandated, or implied approval of, STS; since they did neither, the railroads' tariffs requiring customers to pay for such service was *per se* unreasonable and the ICC was bound to so hold. If the railroads are convinced that the NRC/DOT regulations fail to guarantee adequate safety, claim the intervenors, then they must pursue the remedies available to them before those two agencies. "The railroads' so-called safety evidence should not even have been considered by the [ICC]," they say, "because it has no jurisdiction to impose or permit different standards." Intervenors' Brief at 14.

Somewhere between the railroads and the shippers stands the ICC, which argues that it properly considered all available safety evidence to determine whether tariffs covering the cost of STS were reasonable, and that the course it followed was the only one consistent with its statutory responsibility "to promote safe, adequate, economical, and efficient transportation" and to prevent unreasonable rates and practices from being imposed upon rail users. 49 U.S.C. §§ 10101(a); 10701(a). The Commission further contends that its reliance upon the EIS was entirely correct, and that ample evidence existed to support its factual conclusion that STS is unnecessary, and the tariffs based upon it unreasonable.

The basic issue in this case is whether the ICC properly determined that the railroads' tariffs based on STS were unreasonable. In resolving it, we must answer two questions: first, to what extent did the ICC have authority independently to evaluate the need for STS safety measures;

second, was there sufficient evidence[12] in this record to support the Commission's conclusion that STS was unnecessary as a safety measure.

II. Scope of ICC Authority in This Case

The Interstate Commerce Commission, the oldest of all independent federal regulatory agencies, has a venerable, well-settled mandate to establish revenue levels for the railroads that are "adequate, under honest, *economical, and efficient management*, to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business." 49 U.S.C. § 10704(a)(2) (emphasis supplied). Every "rate" and every "practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission . . . must be reasonable." 49 U.S.C. § 10701(a). Long ago the Supreme Court made it clear that "[no] party has a right to insist upon a wasteful or excessive service for which the consumer must ultimately pay." *Atchison Railway Co.* v. *United States*, 232 U.S. 199, 217 (1914). *See*

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[12]This court applies a deferential standard when reviewing rate determinations of the ICC. Houston Lighting & Power Co. v. United States, 606 F.2d 1131, 1145 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). Our scope of review is delimited by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)–(D), and we will not disturb railroad rate determinations unless it is shown that "'they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of [the Commission's] power.'" Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade, 412 U.S. 800, 806 (1973) (plurality opinion) (quoting Manufacturers R. Co. v. United States, 246 U.S. 457. 481 (1918)). *See also* Asphalt Roofing Manufacturing Assn. v. ICC, 567 F.2d 994, 1002 & n.5 (D.C. Cir. 1977) (holding that proceedings under § 15(1), the predecessor to § 10704, are reviewable under the "arbitrary, capricious, [or] abuse of discretion" standard of 5 U.S.C. § 706(2)(A)).

also Ayrshire Collieries Corp. v. *United States*, 335 U.S. 573, 592 (1949); *Alabama Great Southern Railroad Co.* v. *United States*, 88 F. Supp. 982, 988 (N.D. Ill.), *aff'd*, 340 U.S. 216 (1950); *Akron, Canton & Youngstown Railroad, Routing on Overhead Traffic*, 302 ICC 465, 467 (1957) (preventing railroad from using particular "routes [which] would result in wasteful transportation and would not be in the public interest.").

It is true, of course, as the railroads claim, that under the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*, a zone of reasonableness exists within which the railroads are ordinarily free to set their own rates. *See United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 294 U.S. 499, 506 (1935) (zone of reasonableness ordinarily exists for rates which are neither "less than compensatory" nor "excessive"); *Iron Ore from Cleveland, Ohio*, 323 ICC 746, 752 (1965). But given that this zone indeed exists, the fundamental question still remains whether the STS-based tariffs are "reasonable" as that term has been understood and applied by the Commission for nearly one hundred years. Because it is the Commission's statutory responsibility to ensure that the rates and practices subject to its jurisdiction are "reasonable," petitioners' argument that "the Commission may not disregard the railroads' rational judgment that special trial service be used," must fail. Petitioners' Brief at 24. The question is not whether the decision to use STS can be described as "rational" from the railroads' perspective, but instead whether the practice—and the tariff based on it—is *reasonable* when viewed from the *public* perspective of the Commission, which must reconcile a multitude of factors in exercising its expert judgment on tariff issues, including economy, efficiency, fair wages and working conditions, and safety, in addition to the financial condition of the carriers. *See* 49 U.S.C. § 10101; *see generally Standards and Procedures for the Establishment of Adequate Railroad Revenue Levels*, 358 ICC 844 (1978); *Potomac Electric Power Co.* v. *Penn Central Transportation Co.*, 359 ICC 222, 238 (1977) (various "conflicting con-

siderations [in ratesetting] cannot be reduced to a dry, exact, mathematical formula."); *Investigation of Railroad Freight Rate Structure—Coal*, 345 ICC 493, 505–06 (1976).

Since promoting safe rail transportation is one of the Commission's statutory responsibilities, *see* 49 U.S.C. § 10101(a); *Radioactive Material, Missouri-Kansas-Texas Railroad Co.*, 357 ICC 458, 463 (1977), tariffs which reflect the fair cost of reasonable safety procedures, equipment, and personnel will ordinarily be looked upon with favor by the Commission. Clearly a railroad company acts reasonably when it tries to promote the safety of its employees, passengers, and property; the Commission implicity recognized that in this case: "The railroads have a responsibility to protect their employees, their property and the public from harmful radiation." *Eastern Railroads*, *supra*, 362 ICC at 772. *See also Lehigh Valley Railroad Co.* v. *John Lysaght, Ltd.*, 271 F. 906, 910–11 (2d Cir.), *appeal dismissed*, 257 U.S. 613 (1921).

Obviously this does not mean that every cost allegedly incurred for a safety reason need be approved by the Commission. The mere assertion of safety as a justification for any particular expenditure by a railroad company is not conclusive upon the Commission's judgment of the reasonableness of that expenditure or the tariff based upon it. The safety measures for which expenditures are made must be reasonable ones, which means first, that they produce an expected safety benefit commensurate to their cost; and second, that when compared with other possible safety measures, they represent an economical means of achieving the expected safety benefit.

In this case, the ICC was not required to pursue a completely independent evaluation of whether these criteria of reasonableness for safety expenditures were satisfied. This litigation presents a special situation in which two other agencies have been given specific statutory authority to establish safety standards covering the transportation by rail of radioactive material. In the first place, the Secretary of

Transportation has primary responsibility for assuring the "safe transportation in commerce of hazardous material." 49 U.S.C. § 1804(a). *See* 49 U.S.C. § 1803 (authorizing the Secretary to designate "radioactive materials" as "hazardous material"). He is authorized to issue regulations governing "any safety aspect of the transportation of hazardous materials which [he] deems necessary or appropriate, including, but not limited to, the packing, repacking, handling, labeling, marking, placarding, and routing . . . of hazardous materials, and the manufacture, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold . . . for use in the transportation of certain hazardous materials." 49 U.S.C. § 1804(a). The primacy of the Secretary's authority in this area was confirmed in 1966 by the transfer from the ICC to the Secretary of the responsibility to "formulate regulations for the safe transportation within the United States of explosives and other dangerous articles, including radioactive materials . . . which shall be binding upon all carriers . . . which transport . . . dangerous articles by land . . . ." 18 U.S.C. § 834(a); *see* P.L. 89-670, 80 Stat. 931 (1966), *codified at* 49 U.S.C. § 1655(e)(4) (transferring to the Secretary of Transportation "all functions, powers, and duties" of the ICC over hazardous articles which are found in 18 U.S.C. §§ 831-835.) *See generally Kappelmann* v. *Delta Air Lines, Inc.*, 539 F.2d 165, 169-71 (D.C. Cir. 1976) *cert. denied*, 429 U.S. 1061 (1977) (discussing the Secretary's "primary authority to regulate 'any safety aspects of the transportation of hazardous materials . . . .' "). The statute requires that the hazardous articles regulations drafted by the Secretary "shall be in accord with *the best-known practicable means* for securing safety in transit . . . ." 18 U.S.C. § 834(c) (emphasis supplied).

The Nuclear Regulatory Commission also has a statutorily mandated role in implementing safety measures related to radioactive wastes. The NRC is authorized to "establish by rule, regulation, or order, such standards and instruc-

tions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property[.]" 42 U.S.C. § 2201(b). Congress has determined that the proper balance between adequate safety on the one hand, and promotion of nuclear energy on the other, should lie primarily with the NRC, not with other federal agencies, the states, or the railroads. *See Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143, 1153-54 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972) ("Congress vested the AEC [now NRC] with the authority to resolve the proper balance between desired industrial progress and adequate health and safety standards.").

Pursuant to these congressional mandates, both DOT and NRC have promulgated comprehensive regulations concerning the various safety aspects of rail transportation for radioactive materials. Although the division of authority between DOT and NRC concerning regulation of the transportation of radioactive materials is untidy, *see* Transportation of Radioactive Materials, Memorandum of Understanding, 44 Fed. Reg. 38690-38692 (July 2, 1979) (signed by DOT and NRC on June 8, 1979), together their regulatory authority extends over the entire range of safety considerations implicated by the transportation of radioactive wastes. *Id.* at 38690. The Memorandum of Understanding makes clear that although it is DOT's responsibility to "issue *complete and comprehensive* Federal regulations for the packaging and transportation of all radioactive materials as part of its overall body of federal regulations . . .," the NRC "will adopt packaging standards for . . . radioactive materials . . . and will adopt regulations imposing on its licensees administrative, procedural, and technical requirements necessary to protect the public health and safety. . . ." *Id.* at 38690-91 (emphasis supplied). Pursuant to this arrangement, the NRC has issued regulations governing both the packaging of spent fuel

in secure casks,[13] and the shipping of those casks by rail. Included in the latter are requirements for armed escorts, pre-approval of routes, coordination of all shipments with local law enforcement agencies and requirements concerning scheduling of shipments.[14] The DOT also has detailed, extensive regulations governing the preparation, labelling, packaging and transportation by rail of hazardous materials

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[13]The EIS describes the cask as follows:

> A spent fuel cask is generally cylindrical with lead or steel shielding and external cooling fins. It is clad inside and out with stainless steel. The inner cavity is large enough to accommodate a specified amount of spent fuel depending on the size of the cask. The space between the inner and outer steel shelves is filled with a dense shielding material, such as lead, uranium, or tungsten. The size of the spent fuel cask can vary between 15 and 100 tons, and can be moved by either truck or rail.

EIS at 2–3.

Highly radioactive spent fuel must be enclosed in what the DOT calls "Type B packaging," *See* 49 C.F.R. § 173.389 (1979). Type B packaging must be designed to withstand all normal transport conditions without any loss of contents or shielding efficiency, and to suffer no more than a minimal loss of contents or shielding during a sequence of accident damage test conditions, which include: (1) a free fall from a height of 30 feet onto an essentially unyielding surface with the cask landing in an orientation for which maximum damage is expected; (2) a free fall from a height of 4 feet onto a six inch diameter steel plunger long enough, and with the package in the orientation, to do maximum damage; (3) exposure to fire at a temperature of 1475 degrees Fahrenheit for thirty minutes; and (4) total immersion in water three feet deep for eight hours. *See* 10 C.F.R. § 71.36, Part 71, Appendices A, B (1980) (NRC regulations); 49 C.F.R. § 173.398(c) (1979) (DOT regulations).

[14]*See* 10 C.F.R. § 73.37 (1980), *as amended*, 45 Feg. Reg. 37408–37410 (June 3, 1980).

generally, and radioactive materials specifically.[15] In light of these regulations, the railroads' contention that without STS radioactive materials "would ordinarily be shipped according to the routes, schedules and procedures normally applicable to shipments of other commodities" is without merit. *See* Pet. Br. at 5 n.2. Significantly, neither agency's rules specify the use of STS.

Where DOT and NRC, pursuant to specific statutory authority, have established "complete and comprehensive" safety standards in this particular area, Memorandum of Understanding, *supra*, and have drafted regulations in accord with "the best-known practicable means for securing safety," 18 U.S.C. § 834(c), while balancing the cost of safety with the need for economy, a presumption arises that expenditures for safety measures not specified by these agencies are unnecessary and fail to satisfy the criteria of reasonableness outlined above, *supra* at p. 13, especially when such expenditures inflate shipping costs many times over. The ICC therefore properly defers to the expertise and primary jurisdiction[16] of the NRC and DOT both in determining which particular measures are reasonably required to produce the necessary level of safety, and in deciding whether any particular safety measure will likely produce benefits commensurate with its cost and will be economical.

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[15] *See generally* 49 C.F.R., Part 173 (1979).

[16] It is important to note that this case does not present a conflict between two or more agencies over who shall regulate a given safety matter. Clearly that responsibility rests with DOT and NRC in this case. The question before us here is how the ICC should make use of the DOT/NRC standards in deciding a *completely separate issue*, namely, whether the railroads' voluntary attempt to institute and charge for additional safety measures not mandated by DOT or NRC is "reasonable" under the Interstate Commerce Act.

Only one prior case has faced the issue of the ICC's authority to determine the reasonableness of railroad-proposed safety measures in the carriage of hazardous materials, and the extent of its duties to defer to the expert judgment of DOT/NRC on such matters. In *Akron, Canton & Youngstown Railroad Co. v. I.C.C.*, 611 F.2d 1162 (6th Cir. 1979), *cert. denied*, 49 USLW 3246 (October 6, 1980), the decision which affirmed the ICC's earlier order to petitioner railroads in this case to establish "reasonable . . . tariff provisions" for transporting spent fuel, *see* pp. 5-6, *supra*, the Sixth Circuit stated,

> The Commission's deference to the safety regulations of its sister agencies must extend only this far: a carrier may not ask the Commission to take cognizance of a claim that a commodity is absolutely too dangerous to transport, if there are DOT and NRC regulations governing such transport, and these regulations have been met.
>
> Such a claim is properly made before the agencies entrusted with promulgating these minimum safety regulations. "A carrier thus cannot refuse to haul any materials which meet [DOT and NRC] standards, but it may seek approval of a stricter practice which is shown to be just and reasonable." [*Radioactive Materials, Special Train Service, Nationwide*, 359 ICC 70, 73 (March 8, 1978).] We hold that the Commission has properly stated its role in regulating safety standards for rail transport of nuclear materials. It is entirely possible that, after the petitioners have published tariffs under which special trains would be required to haul these commodities, the Commission would approve tariffs and rates which would enable the individual railroads involved in *this* proceeding to provide special trains to carry nuclear materials, even though such special trains might not be required nationwide.

611 F.2d at 1169 (footnote omitted).

We agree with the court's analysis, as far as it goes. The railroads may indeed seek to prove the reasonableness of additional safety measures, but the burden is upon them to show that, for some reason, the presumptively valid DOT/NRC regulations are unsatisfactory or inadequate in their particular circumstance.

Our position is bolstered further by *Delta Air Lines, Inc. v. CAB*, 543 F.2d 247 (D.C. Cir. 1976), where this court discussed an analogous question concerning the role of the CAB in approving certain airline safety restrictions[17] beyond those mandated by FAA and DOT for transporting hazardous cargo by air. There we said,

> [S]afety has already been determined by the agencies charged with primary responsibility in this area, the FAA and the DOT. While the CAB is instructed by section 102 of the Federal Aviation Act to "consider . . . as being in the public interest, and in accordance with the public convenience and necessity: . . . [1] The regulation of air transportation in such a manner as to . . . assure the highest degree of safety in . . . such transportation . . . [and] [2] The promotion of safety in air commerce . . .", it is clear to us that the Board fulfills its responsibilities with respect to safety questions when it determines that all FAA/DOT safety requirements have been satisfied. *Perhaps under section 102 the Board retains a small residue of authority over safety issues whereby it could impose hazardous cargo standards stricter (but not more lenient) than those of FAA/DOT, yet in general we believe that the Board should defer to the safety expertise of its sister agencies and accept the FAA/DOT position on safety as establishing both an inner and an outer limit on its safety jurisdiction.*

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[17]The restrictions amounted to refusals to ship certain types of radioactive materials. 543 F.2d at 256–58.

543 F.2d at 260 (footnotes omitted; emphasis supplied).[18]

Although a presumption arises from the DOT/NRC regulations that the railroads' expenditures on STS are unreasonable, this does not mean that STS expenditures are in fact not "reasonable" under the Interstate Commerce Act. The ICC must consider the absence of an STS requirement by either DOT or NRC as one important element in reaching its decision whether such service is reasonably necessary for safety reasons, but that fact alone need not always control the outcome. It is possible that the ICC could be presented with evidence rebutting the presumption. For example, it might be shown that DOT and NRC did not intend to establish comprehensive regulations to assure safe transportation of radioactive materials, but rather hoped that other agencies—or private industry—would substantially supplement their regulations; or else it might be shown that the regulations were drafted without any knowledge of the STS option; or that the railroads lacked any meaningful opportunity to present the STS option to DOT or NRC; or that some unusual or special conditions related to petitioners' particular eastern railroad routes made imposition of STS reasonable in their case. No such rebutting evidence, however, was presented in this case.

First, it is clear from the DOT/NRC regulations' comprehensive character that these agencies have attempted to

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[18]The court noted that "the FAA/DOT safety regulations . . . will constitute part of the evidentiary record in the hearing and investigation we now order the Board to conduct. . . ." 543 F.2d at 269.

We note that *Delta Air Lines* may be distinguished from this case in that *Delta Air Lines* primarily concerned the effect of DOT/FAA regulations upon the requests of certain carriers not to handle certain radioactive cargo at all; that issue has already been settled in this case. Akron, Canton & Youngstown Railroad Co. v. ICC, *supra*, 611 F.2d 1162. In addition, the relationship between the CAB and DOT/FAA may differ from that between the ICC and DOT/NRC, *see id.* at 1170.

satisfy fully their statutory duty to assure the safe transportation of radioactive materials. *See* pp. 15–16 *supra*. Nowhere in the regulations is there any indication whatever that the agencies viewed them as bare minimums, and intended to satisfy their duties under law by encouraging further substantial safety measures on the part of the railroads, which could increase shipping costs many times over. Rather, we may justifiably assume that the agencies were sensitive to our national policy, declared by Congress, to regulate nuclear energy so as to *simultaneously* protect public health and safety *and* promote its development. *See* 42 U.S.C. §§ 2012, 2013; *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143, 1153 (8th Cir. 1971), *aff'd mem.* 405 U.S. 1035 (1972) ("Congressional objectives . . . evince a legislative design to foster and encourage the development, use and control of atomic energy so as to make a maximum contribution to the general welfare and to increase the standard of living . . . . However, these objectives were to be effectuated 'to the maximum extent consistent . . . with the health and safety of the public.'"). In this case the safety regulations promulgated by DOT and NRC are entitled to be considered by the ICC as embodying *prima facie* the appropriate balance between safety and nuclear development. *Cf.* 49 U.S.C. § 1806 (authorizing exemptions from DOT hazardous materials regulations for shippers who achieve level of safety equal to, or exceeding that expected under the regulations); 49 C.F.R. § 107.101 *et seq.* (1979) (same).

Second, there is no evidence that these regulations were drafted without specific knowledge of the STS option. On the contrary, the railroads themselves have previously urged NRC to consider this very STS package for the transportation of nuclear wastes. Their suggestion was considered and squarely rejected by the Commission: "Needed protection requirements for rail shipments can be met by regular trains. Accordingly, the suggestion that the regulations be modified to require the use of special trains [is] re-

jected." 45 Fed. Reg. 37408 (June 3, 1980).[19] The NRC's specific rejection of STS implicitly represented a determination that such service was unnecessary from a safety standpoint, and the ICC should properly have given great weight to such a determination by a sister agency vested with the jurisdiction and expertise to make just such a finding.

Third, the railroads have had, and will continue to have, ample opportunity to petition both the NRC and DOT for review of their respective regulations in this area. Any evidence indicating that significant safety benefits could be achieved by STS may be considered by DOT and NRC pursuant to the procedures each agency has established permitting petitions to issue, amend, or rescind transportation safety regulations. 49 CFR § 106.31 (1979) (DOT); 10 CFR § 2.802 (1980) (NRC). *See also* 18 U.S.C. § 834(b) ("The [Secretary of Transportation on his] own motion, or upon application made by any interested party, may make changes or modifications in such regulations, made desirable by new information or altered conditions.").

Finally, we note the absence of any proffered evidence which might persuade either the ICC or this court that particular, distinguishing characteristics of the eastern railroads made STS necessary for them, but not for railroads generally so as to require DOT/NRC specification of STS nationally. *Cf. Akron, Canton & Youngstown Railroad Co.* v. *ICC*, *supra*, 611 F.2d at 1169–70 (inviting the petitioners in this case to make such a showing). In sum, the ICC was entitled in this case to rely on DOT and NRC regulations as establishing a presumption that STS was not reasonably necessary to insure safety, as the railroads asserted it was.

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[19] *See also* U.S. Nuclear Regulatory Commission, 40 Fed. Reg. 23768, 23770 (June 2, 1975) (no evidence that present package and security requirements are inadequate).

The ICC's opinion, however, reveals that the Commission did not explicitly rely on DOT and NRC regulations to establish a presumption against a need for STS, though it would have been proper to do so. *Cf. Eastern Railroads*, *supra*, 362 ICC at 759, 764. Instead, the Commission examined the evidence it had before it without resorting to any presumption against STS, and still concluded that STS provided no cognizable safety benefit, and hence that expenditures for it and the tariffs based upon it were unreasonable. We are satisfied from our examination of the record made before the Commission that sufficient evidence existed to support its conclusion that STS was unnecessary for safety reasons, even without the presumption against STS arising from the DOT/NRC regulations, which we believe the Commission should have taken into account.

III. Evidence Supporting the Commission's Determination

Determining the reasonableness of any expenditure requires a comparison of evidence on cost with evidence on benefit; we therefore analyze each in turn.

The evidence before the Commission related to the cost of STS was largely undisputed. Although the record contained no hard evidence directly comparing the cost to shippers of STS and regular train service, it is clear to us that STS multiplies many times over the cost of transporting spent fuel by rail.[20] Since the railroads' tariffs can be

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[20] The ICC concluded:

> The rates published by the respondent railroads are predicated on the cost of special train service. As we have concluded that special train service is not justified, the rate level must be considered in relation to the cost of regular train service. The published rates are clearly unlawful when compared to the much lower cost of regular train service. As stated, the revenue/variable cost ratios approximate 3000%.

justified *only* on the assumption that STS is needed—and the railroads do not contend otherwise—we may turn immediately to the evidence of alleged safety benefits to be expected from STS. If the evidence shows them to be less than substantial, STS is unreasonable.[21]

1. *The EIS*

The primary evidentiary foundation for the Commission's finding that STS is not reasonably necessary as a safety

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Eastern Railroads, *supra*, 362 ICC at 774. *See also* Government Brief at 4. This, however, does not tell us the difference in cost *to the shippers* between regular train service and STS. *Cf.* Verified Statement of Edward R. Reis, Manager-Fuel Supply, Pennsylvania Power & Light Co., I J.A. at 85–6 (rates are "unconscionably high"); Verified Statement of Robert H. Jones, Manager of Transportation Systems, Spent Fuel Services Operation, General Electric Co., I J.A. at 139–40 (estimating that STS would increase costs by two or three times).

The railroads insist that they have no ulterior reason to seek STS, since "there is no profit to the railroads in wasteful practices which increase railroad operating expenses. . . ." Petitioners' Reply Brief at 13. It is true, of course, that the railroads do not invariably profit from wasteful practices *per se*; but it is equally obvious that shippers end up paying for such practices and it is the ICC's function to prevent that from happening. Furthermore, since the ICC considers cost of service when calculating profit, *see generally* Potomac Electric Power Co. v. Consolidated Rail Corp., 362 ICC 169, 181 (1980), the railroads may in fact actually gain from additional, but unnecessary practices and procedures. *See* 2 A. Kahn, *The Economics of Regulation: Principles and Institutions* 47–59, 106–08 (1971).

[21] It may be possible, of course, for the railroads to institute other, additional safety measures beyond those required by regulation, but which are not so costly that they cannot be accommodated within the tariff already set by the Commission. The ICC recognized this possibility:

> [W]e are dealing with a commodity which does require additional precautions in some circumstances.

measure is the EIS, *see supra* p. 8, whose conclusions were as follows:

> [S]pecial trains will increase the environmental risks from the non-radiological standpoint and from the radiological standpoint under normal transport conditions. However, special trains will decrease the environmental risks from the radiological standpoint under accident conditions. In all cases, however, the incremental environmental impact of special trains as opposed to regular trains is very small.

EIS at i. Regarding the radiological dangers under accident conditions—the only circumstance under which the EIS found STS to be advantageous—the EIS weighed the likelihood of an accident against the magnitude of any resulting harm, and concluded,

> Model II consequences indicate that regular train accidents would result in approximately one latent cancer fatality every 1,660 years while special train accidents would result in one latent cancer fatality every 6,250 years. Model I consequences indicate that regular train accidents would result in one latent cancer fatality every

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> *We think it is proper to allow a slightly higher ratio* [in calculating the reasonable tariff] *than we would otherwise allow to give the railroads some latitude in the handling of these commodities.* Obviously, we are dealing here with a particular set of facts and our conclusions are limited to these circumstances. In our view, a rate level of approximately 7 percent of the revenue/variable cost ratio of the column 1820 and 1830 rates would cover all the costs of service and provide an adequate return on all related investments. *In addition, it should give adequate incentive for the railroads to maintain beneficial safety measures* in the transportation of nuclear waste.

Eastern Railroads, *supra*, 362 ICC at 775 (emphasis supplied).

> half year while special train accidents would result in one latent cancer fatality every five years.

EIS at 4–48.[22] Having carefully considered the evidence and conclusions found in the EIS, we agree with the Commission that the EIS provides "strong evidence . . . that special train service would be for all practical purposes no safer than regular train service." *Eastern Railroads*, *supra*, 362 ICC at 773.

The railroads argue that the Commission's reliance on the EIS was improper, since it was not submitted by any party as evidence and no notice was given to the parties that it would be treated as substantive evidence. For this reason, they say, they lacked an opportunity to meet its conclusions. Petitioners' Brief at 35–45. The railroads also attempt to undermine the validity of the EIS by asserting that it relied upon outdated information, and upon studies not completed when the EIS was prepared. *Id.* at 38.

These arguments are unpersuasive for three reasons. First, petitioner railroads actively participated in the notice and comment procedures prior to the issuance of this EIS. *See* EIS at 9–8. Second, petitioner railroads *had actual notice* that the Commission would use the EIS in future proceedings related to the environmental effect of

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[22] Models I and II refer to different sets of hypothetical accident circumstances. As the EIS describes them,

> [T]wo different exposure models are considered: (1) Model I—the container completely fails exposing all its contents at a severity level just above the level at which it is required to survive; and (2) Model II—the container partially fails exposing some of its contents just above the level at which it is required to survive.
>
> . . . .
>
> The annual radiological risks given under Model I conditions are much larger than those given under Model II due to the extremely conservative [worst case] as-

STS. The tentative draft of the EIS document at issue here—the draft to which the railroads responded with comments—stated on its first page,

> This impact statement is generic in nature, and can be used by the Commission in any proceeding in which the issue is the health and safety effects associated with special rather than regular train service.

> sumptions used in Model I. The Model II results are considered a more realistic representation of the consequences of train accidents involving spent fuel or waste shipments.

EIS at 4–46, 4–48. The EIS's conclusions concerning the relative safety impacts of STS and regular train service (under accident conditions) are summarized in the following table:

EIS Table 4.11*

SUMMARY OF ANNUAL RADIOLOGICAL AND NON-RADIOLOGICAL IMPACTS OF TRANSPORTING SPENT FUEL OR WASTE BY REGULAR AND BY SPECIAL TRAINS—ACCIDENT CONDITIONS

	Radiological Impacts			
	Special Trains		*Regular Trains*	
	Model I	*Model II*	*Model I*	*Model II*
Latent Cancer Fatalities	0.22	1.6×10^{-4}	2.0	6.0×10^{-4}
Early Fatalities				0
	Non-Radiological Impacts			
	Special Trains		*Regular Trains*	
	Model I	*Model II*	*Model I*	*Model II*
Accident Fatalities	1.6	1.6	0	0
Grand Total	1.82	1.6	2.0	6.0×10^{-4}

* EIS at 4–55 (footnote omitted).

Draft EIS at "Summary," p. 1.[23]

The decisive answer to these objections, however, is that the railroads had ample opportunity during the course of the proceeding below to contest any and all data underlying the conclusion contained in the EIS. The railroads had to have been aware, both in fact and as a matter of law, that the Commission would rely upon its EIS in this case. The issue raised by the railroads in this case was *identical* to the issue discussed in the EIS, a document which the railroads participated in drafting and which was served upon them. Further, when this matter was being litigated below, the *Nationwide* case, *supra*, 359 ICC 70, was the most recent ICC decision on the issue of STS tariffs, *and there the Commission relied upon the EIS*.[24] Thus the railroads had

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[23]*See also* Draft EIS at 3:

> Although the procedural posture of all these proceedings differs significantly, the same basic question is presented, i.e., whether environmental and safety considerations justify the railroad's proposed requirement that spent nuclear fuel and radioactive waste materials move in special trains as opposed to regular train service. In view of the identical environmental questions raised in each of [these] proceedings, this environmental impact statement is generic in nature, and can be utilized by the Commission in any proceeding which involves the question of regular vs. special train service for the transportation of radioactive materials.

See also Draft EIS, "Notice to the Parties," at 1:

> Inasmuch as all of the entitled proceedings present the same environmental questions, one generic impact statement has been prepared and will be used to assess the environmental impacts associated with any environmental proceeding which involves the question of whether health and safety considerations require the utilization of special train service by the Nation's railroads.

[24]The railroads can hardly claim to have been surprised that *Nationwide* might be used by the Commission in this proceed-

ample warning that new, persuasive evidence would be needed to undermine the Commission's previously shown reliance upon the EIS. Unless the railroads submitted such evidence, the Commission was entitled to rely on its EIS as a basis for its decision in this case. For the Commission to prepare an extensive and detailed EIS addressed to the very issue of this case and then ignore it in rendering its decision, would be both a waste of its time and resources, as well as contrary to the policies of the National Environmental Policy Act, 42 U.S.C. § 4332. *See generally* Council on Environmental Quality, Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements, 3 Environ. Rep. (BNA) 82, 87 (1972) (recommending that agencies "consolidat[e] numbers of impact statements into fewer but broader and more meaningful reviews."). The Commission was entitled to rely upon its safety findings in *Nationwide*—a proceeding directly relevant to the one *sub judice*—and it was entirely proper for it to apply the expertise and knowledge it had gained in that proceeding to this case, since petitioners were given a full opportunity to contest the earlier findings with new evidence. *See generally United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 529–30 (1946).

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ing as precedent against them, since their opponents cited *Nationwide* for its holding on the safety issue a number of times in their briefs and papers. *See, e.g.*, Surrebuttal Statement of Protestants Other Than Federal Agencies 9 (I & S Docket No. 9025) (filed June 22, 1979); Reply in Opposition to Petition to Intervene 3 (I & S Docket No. 9025) (filed July 6, 1979) ("the safety issue has been litigated before this Commission on comprehensive records in three different proceedings: [citing *Nationwide*]. . . .[T]hose decisions are important as *stare decisis*. . . ."); Opposition of the Dept. of Energy to Petition to Intervene 1-2 (I & S Docket No. 9025) (filed July 11, 1979) ("[The *Nationwide* decision is] strong precedent on all fours with the issues of the instant case.").

2. *Other Evidence*

In addition to witness testimony supporting the conclusion that STS was unnecessary,[25] there was ample, uncontradicted evidence in the record of significant, adverse impacts on shippers which would result from the high STS tariffs.[26] The most important thing to be said about the witness testimony, however, is that the railroads' witnesses failed to present concrete evidence that safety benefits accruing from STS would be significant enough to match its high cost.[27] Petitioners also failed to show why the comprehensive DOT/NRC regulations currently in effect would not achieve substantially the same benefits as those claimed for STS. In sum, petitioners failed to undermine the Commission's properly grounded confidence either in is prior determination in *Nationwide* that STS was unnecessary, or in its EIS.

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[25] *See* Verified Statement of Clarence E. Jackman, Transportation Consultant, I J.A. 88–98 ("In my opinion the requirement of special train service for radioactive materials is entirely inappropriate and the handling of such commodities in special train service rather than in regular train service would constitute a waste of transportation service." *Id.* at 95); Verified Statement of John C. Sperry, Transportation Consultant, I J.A. 115–22 (agreeing with, and adopting as his own, Mr. Jackman's testimony, while making other remarks against using STS).

[26] *See* Verified Statement of James M. Clabby, I J.A. 99, at 108; Verified Statement of George P. Rifakes, I J.A. 123, at 128; Verified Statement of Robert H. Jones, I J.A. 138, at 139–40.

[27] The railroads' evidence on the need for STS hinges primarily on the assertion that the casks containing spent fuel are insufficiently secure when they are transported using regular train service. *See generally* Opening Statement of Facts and Argument of Eastern Railroads 12 (ICC I & S Docket No. 9205) (filed Apr. 18, 1979) ("The objective of special train service is to assure insofar as possible that the accident environment will not

IV. Conclusion

This court recognizes the potentially grave hazards which inhere in large-scale rail transportation of highly radioactive materials. Congress has mandated that DOT and NRC take appropriate steps to insure that these hazards are minimized. However, Congress has also required that all tariffs and practices related to rail transportation under the jurisdiction of the ICC be "reasonable." In judging the reasonableness of the tariffs in this case, the ICC was entitled to assume that heavy additional expenditures by the railroads, allegedly for "safety" but mandated neither by DOT or NRC, were presumptively unnecessary and hence unreasonable. Since the railroads failed to present evidence sufficient to rebut that presumption, we believe the Commission acted properly in finding on this record that STS was unnecessary as a safety measure, and that the tariffs based on it were therefore unreasonable. The orders of the Commission are therefore

Affirmed.

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be more precarious than that contemplated by the cask testing standards [of NRC and DOT].").

The railroads argue at length that certain accident conditions which might occur using regular train service—collisions at 35 MPH or greater, or prolonged fires, for example—could cause dangerous leaks in the casks. Petitioners' Brief at 16–19. Clearly, however, all arguments concerning the inadequacy of federal specifications for spent fuel casks must be addressed to DOT and NRC in the first instance. If the cask specifications are inadequate to cope with the exigencies of regular train service—the service by which DOT/NRC evidently expected the casks to travel—then it is DOT or NRC's responsibility to change them, or else change the manner in which the casks are transported. After carefully examining the railroads' evidence, we find that it falls far short of demonstrating either that (a) the DOT/NRC cask specifications are too lax to cope with the exigencies of regular train service, or (b) assuming *arguendo* they are too lax, that the appropriate solution is STS.

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 80-1709

CONSOLIDATED RAIL CORPORATION, et al., *Petitioners*

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA, *Respondents*

COMMONWEALTH EDISON COMPANY, et al.,
General Electric Company,
GPU Service Corporation, et al., *Intervenors*

BEFORE: Robinson and Wald, *Circuit Judges*: June Green*, *Judge*, United States District Court for the District of Columbia

ORDER

Filed April 3, 1981

On consideration of the petition for rehearing filed by the petitioner Railroads on March 12, 1981, it is

ORDERED by the Court that the aforesaid petition is denied.

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* Sitting by designation pursuant to Title 28 U.S.C. §292(a).

It is FURTHER ORDERED by the Court, *sua sponte*, that the opinion of February 26, 1981 is amended by deleting the following sentence from footnote 20 at page twenty-four:

> Furthermore, since the ICC considers cost of service calculating profit, *see generally* Potomac Electric Power Co. v. Consolidated Rail Corp., 362 ICC 169, 181 (1980), the railroads may in fact actually gain from additional, but unnecessary practices and procedures. *See* 2 A. Kahn, *The Economics of Regulation: Principles and Institutions* 47-59, 106-08 (1971).

Per Curiam

APPENDIX C

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 80-1709

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v.

INTERSTATE COMMERCE COMMISSION
AND UNITED STATES OF AMERICA, *Respondents*

COMMONWEALTH EDISON COMPANY, et. al.,
GENERAL ELECTRIC COMPANY,
GPU SERVICE CORPORATION, et. al., *Intervenors*

BEFORE: McGowan, Chief Judge; Wright, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

Filed April 3, 1981

The suggestion of the petitioner Railroads for rehearing *en banc* has been circulated to the full court. A majority of the judges of the court have not voted in favor of the suggestion. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER, *Clerk*

/s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge MacKinnon would rehear this case *en banc*.

Chief Judge McGowan and Circuit Judge Edwards did not participate in this order.

APPENDIX D

APPENDIX D

Served May 2, 1980

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INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 9205

TRAINLOAD RATES ON RADIOACTIVE MATERIALS, EASTERN RAILROADS

INVESTIGATION AND SUSPENSION DOCKET NO. 9205[1]

TRAINLOAD RATES ON RADIOACTIVE MATERIALS, EASTERN RAILROADS

Decided April 11, 1980

Special trainload service rates on movements of radioactive waste and irradiated nuclear reactor fuel elements requiring protective shielding in the East found unjust and unreasonable and in violation of an outstanding order of the Commission. Assailed rates under investigation ordered canceled, reparation awarded, and a just and reasonable basis of rates for the future prescribed.

Harry N. Babcock, Richard W. Kienle, Angelica D. Lloyd, and *Charles E. Mechem* for eastern railroads.

James F. Bromley, Omer F. Brown II, John Guandolo, Donald Macleay, Michael F. McBride, Charles J. McCarthy, Leonard M. Trosten, and *Harry H. Voigt* for protestants other than Federal agencies.

Joseph DiStefano for United States Department of Energy.

Milton J. Grossman and *Arthur H. Simms* for Commission's Office of Rail Public Counsel.

DECISION

BY THE COMMISSION:

In Investigation and Suspension Docket No. 9205, by tariff schedules[2] filed to become effective December 9, 1978, the eastern railroads including the trustee of the Chicago, Rock Island and Pacific Railroad Company (respondents herein who were party defendants in No. 36312, *U.S. Energy Research & Development Adm.* v. *Akron,* 359 I.C.C. 639 (1979), proposed to establish new rates and governing provisions for trainload service on movements of radioactive waste and irradiated nuclear reactor fuel elements requiring protective shielding in the East. The proposed trainload

[1] This decision also embraces Investigation and Suspension Docket No. 9205 (Sub-No. 1), Trainload Rates on Radioactive Materials, Eastern Railroads.

[2] Traffic Executive Association—Eastern Railroads, Agent, Tariff E-2009-I, I.C.C. C-1008, Supplement 224.

rates would apply on shipments in containers on flatcars released to value not in excess of 40 cents per pound. The schedules were issued in purported compliance with the orders of the Commission in No. 36312 et al., *supra*. By order served December 8, 1978, the Commission suspended the operation of the schedules to and including July 8, 1979, and instituted an investigation into the lawfulness of them.

In Investigation and Suspension Docket No. 9205 (Sub-No. 1), the Commission by decision served December 14, 1978, ordered the defendant railroads in No. 36312 et al., (respondents herein) to show cause why the flag outs from the Uniform Freight Classification in connection with the transportation of radioactive waste materials should not be striken from defendants' tariffs. The flag outs were ordered canceled by division 2 in No. 36312 et al., upon finding that they violated sections 1(4) and 6(1) of the Interstate Commerce Act and the national transportation policy (now codified as 49 U.S.C. 11101, 10762(a)(1), and 10101, respectively). In response to the show cause order, the railroads contended that the filing of the new trainload rates complied with all of the requirements of division 2's orders.[1]

The respondents have made convincing arguments (1) that the new tariff schedules providing for trainload service involve initial rates, (2) that the protestants have the burden of proof, and (3) that division 2's order requiring the cancellation of the flag outs would be tantamount to a rate prescription reflecting the classification basis without proper justification since rate levels were not in issue in No. 36312 et al. The Commission, by decision of March 15, 1979, vacated the suspension of the involved schedules but allowed the investigation to continue. The railroads were ordered to keep account of the money collected under the "interim" rates pursuant to 49 U.S.C. 10717, in order to facilitate refund of the amount, if any, by which the interim rates collected exceeded the rates finally authorized by the Commission. In I. & S. No. 9205 we conclude that the defendant railroads' failure to cancel the flag outs in issue in No. 36312 et al., was not in violation of division 2's order. However, division 2 also ordered the railroads "to publish reasonable and

[1] Under the terms of division 2's orders the defendants were required and directed to cancel the flag outs there in issue and to publish reasonable and otherwise lawful tariff provisions. The flag outs referred to are described in No. 36312 et al., and, in essence, they provide that ratings for spent nuclear fuel and radioactive waste in the Uniform Freight Classification will not apply on traffic moving from or to points on or routed via the lines of the defendant railroads in the said proceedings.

otherwise lawful tariff provisions covering the transportation" of the involved materials. We conclude that the railroads have failed to comply with the latter requirement, and thus are in violation of division 2's orders in No. 36312 et al.

The Commission's decision served March 19, 1979, required the respondent railroads to lead and close in the presentation of evidence. We held that the "carriers rather than the protestants, possess the relevant data and are in the best position to come forward first with the presentation of evidence supporting the proposed rates." In a later decision served April 20, 1979, we granted the protestants' alternative request to present surrebuttal evidence. On April 18, 1979, the respondents filed their opening statement of facts and argument, and reply statements of facts and argument were filed separately by the U.S. Department of Energy (DOE) and by the protestants other than Federal agencies[1] on May 18, 1979. The respondents filed a rebuttal statement on June 7, 1979. Separate surrebuttal statements were filed by the same protesting parties on June 22, 1979.

Procedural matters.—On June 21, 1979, the Office of Rail Public Counsel (Office) filed a petition for leave to intervene accompanied with a memorandum setting forth the Office's position with respect to transportation safety and other issues. Although the sought intervention is opposed by DOE, we believe that the views of the Office should be considered on public interest grounds. Accordingly, the petition is granted, and the Office's memorandum is accepted for filing. The Office suggests that the present record is not satisfactory for resolving the important issues of public safety and that we should have the parties develop further evidence in this regard. In our view, however, such matters may be adequately considered and disposed of on the record as made.

DOE filed a motion to strike all testimony of the railroads relating to safety-related issues and those concerning the adequacy of insurance coverage primarily on the ground that the Commission has already ruled in related proceedings in No. 36307 and No. 36312 that such matters normally fall under the jurisdiction of the U.S.

[1]Commonwealth Edison Company, Exxon Nuclear Company, Inc.; Houston Lighting and Power Company; Kansas City Power and Light Company; Kansas Gas and Electric Company; Niagara Mohawk Power Corporation; Northern States Power Company; Pacific Gas and Electric Company; Philadelphia Electric Company; Power Authority of the State of New York; Public Service Company of Indiana, Inc.; Rochester Gas and Electric Corporation; Southern California Edison Company; Union Electric Company; Vermont Yankee Nuclear Power Corporation; GPU Service Corporation; Pennsylvania Power & Light Company; Virginia Electric and Power Company; General Electric Company; and NL Industries, Inc.

Department of Transportation (DOT) and the Nuclear Regulatory Commission (NRC). Division 2, in its decision served July 5, 1978 in No. 36312 et al., held that testimony of the type objected to here is pertinent for the purpose of determining whether the considered services meet or exceed the requirements of DOT and NRC. In his initial decision served August 24, 1977, in No. 36325, *Radioactive Materials, Special Train Service, Nationwide*, the Administrative Law Judge construed *Delta Air Lines, Inc.* v. *CAB*, 543 F. 2d 247 (D.C. Cir. 1976), as holding that the CAB could approve safety standards which were stricter, but not less strict, than those of the FAA and DOT which held primary jurisdiction over the matters involved. Primarily on the authority of that decision, the Administrative Law Judge held that allowing the introduction of safety evidence would not improperly infringe on the jurisdiction of DOT and NRC. On appeal, division 2 modified the Administrative Law Judge's holding in this regard and held that such evidence should be limited to determining whether the considered services meet or exceed the requirements of DOT and NRC. Although we upheld division 2's position upon administrative appeal of that decision and similar holdings were upheld by us in Nos. 36307 and 36312, we now hold that such safety evidence may be given full probative weight by us without infringement upon the jurisdictional province of NRC and DOT. The safety matters will be considered in our determination of the justness and reasonableness of the initial rates in issue. The motion to strike is denied. For the same reasons, a motion to strike similar testimony of respondents' witnesses Hasselman, Harris, Gibson, Baxter, Benson, Nelson, and Williamson on similar jurisdictional grounds, filed jointly by the protestants other than Federal agencies, is likewise denied. The latter protestants also object to references to testimony in No. 36312 et al., made by respondents' witnesses Harris, Baxter, and Benson and move that such material be stricken. The manner in which this testimony was offered violates rules 47 and 80 of the Commission's Rules of Practice (49 CFR 1100.47 and 1100.80). Protestants also move to strike, on the ground of hearsay, a portion of witness Baxter's testimony relating to a paper (study) by a Mr. R. E. Best and a Mr. R. R. Garrison. We take official notice of the paper entitled "Worldwide Spent Fuel Transportation Logistics" which was presented to the 5th International Symposium on Packaging and Transportation of Radioactive Materials at Las Vegas, NV on May 7 to 12, 1979. The motion to strike is denied. In their surrebuttal statement, the protestants make alternative requests that in the

event their earlier separate motions to strike respondents' safety and safety related evidence are denied, we incorporate by reference or take official notice of various enumerated exhibits and other specified material that they submitted in No. 36312 as rebuttal to respondents' safety evidence taken from No. 36312. The manner in which the requested evidence is sought to be introduced violates rules 47 and 80 of the Commission's Rules of Practice.

The respondents filed a motion to strike (a) the further verified statement of witness Garrison for DOE and (b) the verified statement and surrebuttal verified statement of witness Fauth, attached as appendixes A and B, respectively, to the surrebuttal statement of protestants other than Federal agencies. The material is objected to as new matter not properly confined to rebuttal of respondents' rebuttal statement in violation of rule 47 of the Rules of Practice. In our view, the material objected to constitutes proper rebuttal evidence responsive to factual and legal controversies raised in respondents' reply statement of facts and argument. The motion to strike will be denied.

Market dominance.—A threshold issue is whether the railroads hold market dominance over the considered traffic. The burden of proof rests upon the protestants to prove that respondents do have market dominance. Pertinent to this issue are the provisions of 49 CFR 1109.1(g) which states:

> (g) In a proceeding involving a determination as to market dominance wherein the evidence adduced establishes one of the following situations, a rebuttable presumption that the carrier whose rate is in issue has market dominance over the involved traffic or movement will arise: (1) where the proponent carrier has handled 70 percent or more of the involved traffic or movement during the preceding year; the market share of the proponent will be deemed to include the share of any affiliates, and of any carrier participating in the rate or with whom the proponent carrier has discussed, considered, or approved the rate in issue; (2) where the rate in issue exceeds the variable cost of providing the service by 60 percent or more; and, (3) where affected shippers or consignees have made a substantial investment in rail-related equipment or facilities which prevents or makes impractical the use of another carrier or mode.

Although the respondents contend otherwise, we believe that the protestants have established the presumptions of market dominance under situations (2) and (3) above. These presumptions have not been effectively rebutted by respondents.

With respect to situation (2) above, the protestants have presented acceptable cost evidence pertaining to special trainload service which establishes that the special trainload rates in issue

exceed the variable costs of providing the service by revenue/cost ratios ranging from 335.2 to 688.9 on a representative movement in eastern territory from North Anna, VA to Chicago, IL. For other movements within eastern territory, the revenue/cost ratios would vary slightly but still would be in the same general range for trains including the same number of cask cars.

Concerning situation (3) above, the evidence shows there has been a substantial investment by the government and by private nuclear reactor electric utilities in special railcars, casks, and related equipment and rail spurs from plant facilities to rail lines. The government estimates that it has about $175 million invested in such items. All government shipments of spent fuel and radioactive components move by rail in government-owned equipment. All systems surrounding the involved transportation—from the design and fabrication of the cask to the type of facilities for handling of the cask and flatcar—are geared totally to railroad transportation. Thus, the government has invested substantial amounts in highly specialized railroad equipment for handling the involved shipments. Pennsylvania Power and Light Company spent approximately $2 million building a rail spur from the existing rail line to its plant under construction near Berwick, PA. Commonwealth Edison Company's nuclear reactors have rail access directly into the fuel building. These facilities represent a substantial investment in rail-related equipment.

In an attempt to rebut the above presumptions of market dominance, the respondents claim that inasmuch as various reactor operators have in the past utilized motor carriers for transporting part of the involved shipments, that mode would still be a reasonable alternative to rail service under the special trainload rates.

While DOE has shipped a variety of spent fuel in the past in the so-called "Hallam" cask by motor vehicle, only a few such shipments are involved in those movements. They consisted of a different type of spent fuel which had been stored for 8 years. Since much of the radioactivity has been dissipated, it needs only the 7 inches or so of shielding that characterizes the Hallam cask. Spent fuel which has been stored for a few months or less (or no storage at all) requires more shielding than the Hallam cask provides. The weight of one of the heavily shielded rail cask cars (empty) needed for transporting typical shipments of spent fuel is approximately 300,000 pounds. The maximum loading capacity is about 60,000 pounds. The only traffic of the affected commodities now moving in

any quantity is government traffic. The special trainload rates in issue here reflect basically the same contract charges on section 22 (formerly section 22 of the act now codified under 49 U.S.C. 10721(b)(1) and (2)) tenders imposed on the government in 1975. Although the effect of the new rail contracts was to double the transportation charges on the involved commodities, the government continued to use rail service under protest without interruption. Obviously, the traffic is captive of the railroads.

While the evidence submitted by the protestants other than government agencies shows that various electrical generating utilities have utilized motor carriers for transporting both low intensity radioactive waste and spent nuclear fuel assemblies, such transportation has proved to be unsatisfactory for various reasons, including (1) the impracticality of handling the lading (substantially greater loading and unloading time is required by motor carrier than by rail) and (2) uneconomical transportation charges by motor carrier which are more than double those applicable on the same contents moved in regular-train service. Additionally, the use of motor carrier service is disadvantageous because it requires 10 to 12 motor shipments to handle the contents of one rail cask car.

During the 1965-69 period Commonwealth Edison Company made 23 rail shipments containing 521 canisters of nuclear fuel from Devine, IL to the reprocessing plant operated by Nuclear Fuel Services (NFS) in West Valley, NY. Allegedly during a rail equipment shortage in the 1973-74 period, Commonwealth Edison shipped 203 fuel assemblies in 103 truck shipments. During the 1966-67 period, Commonwealth Edison made 42 similar shipments to NFS by truck. Although Commonwealth Edison views truck transportation as an unsatisfactory alternative to rail, it desires to have both rail and truck transportation capabilities. Based on projections reflecting estimated annual rail shipments of spent nuclear fuel assemblies from August 1960 through October 1982, Commonwealth Edison plans to make 75 rail shipments containing approximately 1,222 assemblies for all of its nuclear power reactors located at various points in Illinois.

The Power Authority of the State of New York has to date used trucks to transport all radioactive waste materials (other than spent nuclear fuel) which is routinely produced during operation of a nuclear power plant.

As previously indicated, the government is the only shipper now making volume shipments of the involved traffic. However, nuclear reactor operators will soon have to make such shipments if they are

to continue operating, as their local storage at plant locations is limited. Inasmuch as the commercial shippers have no investment in cars or casks (such specialized equipment is leased from General Electric and NL Industries), the respondents contend that "it is crystal clear that these shippers can and will use truck transportation."

Primarily, the respondents rely on the traffic data submitted by the protestants to support their allegation of truck competition. While such sketchy traffic data may fall short of establishing a presumption of market dominance under the market share test, the same basic evidence relied on by the respondents is inadequate to prove the existence of effective motor carrier competition for this traffic. The fact that some shipments on the involved commodities have and will continue to move by truck by no means establishes that the motor carrier mode is competitive with rail. It is unrealistic to expect motor carriers actively to participate in volume movements of high-intensity radioactive spent fuel assemblies requiring shielded containers weighing about 300,000 pounds when empty. From the standpoint of weight or density, spent nuclear fuel would constitute the majority of the involved traffic. Thus, practically speaking, motor carrier movement of the majority of these commodities is not a reasonable alternative and does not represent effective competition.

Respondents have failed to rebut the presumptions established by protestants that they have market dominance over the issue traffic. We find that this traffic is market dominant.

Protestants' evidence.—All government shipments move on cars that have been registered for unrestricted interchange service. Such shipments involve (1) low level radioactive waste moving on regular flatcars, and (2) irradiated fuel elements (spent fuel) moving on depressed-center government-owned flatcars. Both are a form of waste shipments, except that the latter is moving for reclamation of reusable materials, whereas the former moves solely for disposal. The special trainload tariff does not distinguish between the low level waste and the spent fuel shipments.

All the railroads, including the eastern railroads, have had the same indemnity protection in the event of accidents involving government shipments for the past 20 years under a contract between the eastern, southern and western railroads, on the one hand, and the then existing Atomic Energy Commission on the other. That contract still remains in force, whether the traffic moves under tariff rates or so-called section 22 tenders. Nuclear liability

arising out of all shipments of spent fuel or radioactive waste is insured under both the Facility Form purchased by the reactor operator, and by the indemnity provided by NRC to the reactor under the Price-Anderson Act.

Although the respondents contended otherwise, the protestants' evidence is convincing that the type of specialized rail equipment used for the involved shipments is appropriate for regular train service. The railcars used are unrestricted for interchange and comply with DOT and NRC regulations. We do not believe that such shipments in regular train service would be subject to undue transit delays due to interchange and other restrictions as forecasted by the respondents. Highly qualified railroad operational experts testified that special train service was not needed for the movement of cars which were neither over dimension nor overweight and did not have an especially high center of gravity (the cars involved are not subject to these deficiencies).

The protestants specify two major issues here: the lawfulness of the special trainload rates and the question whether the railroads have complied with division 2's order in No. 36312 ordering them to cancel their flag outs in issue in I. & S. No. 9205 (Sub-No. 1). Not only do the protestants attack the rates in issue as being grossly unreasonable, but urge that they be condemned as constituting wasteful transportation service which would result in unreasonable practices prohibited under 49 U.S.C. 10701(a) and 10704(a)(1) (formerly section 1(6) of the Interstate Commerce Act). See *Atchison Railway Co.* v. *United States*, 232 U.S. 199, 217 (1914), and *Oklahoma Grain via Wichita to Memphis*, 248 I.C.C. 767, 772 (1942). See, also No. 37036, *U.S. Department of Energy, et al.* v. *The Baltimore and Ohio Railroad Company, et al.*, decided October 5, 1979.

The special trainload rates cover only a one-way movement with an additional charge for returning the empty. The scale of rates runs up to 2,700 miles. The total charges under the issue rates for a round trip movement of a single car for 900, 1,800 and 2,700 miles would be as follows:

	900	1,800	2,700
		Miles	
GEX CAR			
Loaded (column 1830)	529,428	855,327	880,950
Empty (column 1831)	28,285	53,555	78,513
Total	57,713	109,882	159,463
NLIX CAR			
Loaded (column 1820)	30,972	57,723	84,201
Empty (column 1821)	29,690	55,734	81,463
Total	60,662	113,457	165,664

The protestants developed variable costs for representative movements in regular train service of radioactive materials within eastern territory by application of 1977 Rail Form A for four of the respondent railroads. The protestants take the position that costs based on regular train service is pertinent here because (a) shippers do not desire special trainload service, (b) there is no sound reason why the involved commodities cannot be transported in regular train service, and (c) special trainload service would constitute wasteful transportation. All 1977 costs were indexed up to January 1, 1979, using the specified indexing procedure in ICC statement No. 1E3-78, "Explanation of Rail Cost Update Procedures." The variable costs thus developed for regular train service were compared with both the charges under the special trainload rates (single-car rates) and those under the class 40 rates (under which radioactive materials move in other territories). The results of protestants' cost study are set forth in appendix A and appendix B. The average revenue/cost ratios thus computed were (a) 3652.4 in G.E. cask cars and 3053.6 in N.L.I. cask cars at the single-car rates in issue for regular train service, and (b) 1095.8 in G.E. cask cars and 1039.5 in N.L.I. cask cars at class 40 rates for regular train service. Because of the indicated substantial earnings under 26 class 40 rates, the protestants other than Federal agencies urge that we prescribe rates for the future which are lower than the classification basis. They seek rates constructed on the basis of 7 percent of the revenue/variable cost ratio for the proposed column 1820 and column 1830 rates. This would yield revenue/cost ratios of 213.8 (3053.6 x .07) and 255.7 (3652.4 x .07), respectively.

The costs submitted on behalf of the protestants in their opening statement have been computed in a correct manner. The

respondents have questioned neither the representativeness of the selected movements nor the development of the costs. They conceded implicitly that the revenue/cost ratios developed by protestants are correct but argue that since the special train service is necessary and will be provided, protestants' cost evidence based on regular train service is totally irrelevant for any purpose.

In their surrebuttal statement the protestants other than Federal agencies also developed variable costs derived by applying Chesapeake and Ohio Railroad Rail Form A data (based upon 1977 base year experience indexed to October 1, 1978, by use of ICC statement No. 1E3-78, "Explanation of Rail Cost Update Procedures") for special trainload service on a representative movement of this traffic from North Anna, VA to Chicago, IL (the through movement destined to Richland, WA). The costs, revenues, and revenue/cost ratios so developed for the movement in eastern territory to Chicago (850 origin rail miles) are as follows:

	G.E. cask car	N.L.I. cask car
One cask car train:		
Revenue	$27,242.00	$28,710.00
Variable cost	8,123.79	8,197.07
Revenue/cost ratio	335.3	350.2
Three cask car train:		
Revenue	43,440.00	47,844.00
Variable cost	8,740.03	8,959.88
Revenue/cost ratio	497.0	534.0
Five cask car train:		
Revenue	59,640.00	66,980.00
Variable cost	9,356.28	9,722.68
Revenue/cost ratio	637.4	688.9

Our analysis of the protestants' cost data for special trainload movements of radioactive materials in eastern territory indicates that the methodology used was appropriate, that the development of costs by protestants for this type of service is reliable and that the revenue-to-variable cost ratios are mathematically correct. The variable costs based on C&O unit cost factors may not be considered representative of the railroads generally operating in eastern territory. Accordingly, we have restated the costs by substituting 1976 territorial average unit costs (for the official territory updated to October 1978 level by ratio 1.154) for those applicable to C&O operations. The results which follow are supported by the underlying worksheets set forth in appendix D.

	G.E. cask car	N.L.I. cask car
One cask car train:		
Revenue	$27,242.00	$28,710.00
Variable cost	9,797.37	9,884.56
Revenue/cost ratio	278.1	290.5
Three cask car train:		
Revenue	43,440.00	47,844.00
Variable cost	10,522.25	10,783.82
Revenue/cost ratio	412.8	443.7
Five cask car train:		
Revenue	59,640.00	66,980.00
Variable cost	11,236.71	11,672.64
Revenue/cost ratio	530.8	573.8

We deem these costs to be representative of the operations contemplated under the special trainload rates in issue. For other movements within eastern territory, the revenue/cost ratios would differ slightly, but would still be in the same general range for trains with the same number of cask cars. Also, the revenue/cost ratios for two and four cask car trains would approximate the medium points between the ratios for one and three cask car trains and for three and five cask car trains, respectively.

The protestants submitted additional surrebuttal evidence containing a comparison of present class 40 and special trainload rates with costs related to 12 movements of radioactive materials in regular train service by the eastern railroads. The results as shown in appendix C represent fully allocated costs plus the current cost of capital for the movements using the methodology employed by the Commission in determining a maximum reasonable rate in its decision served June 1, 1979 in No. 36180, *San Antonio, TX* v. *Burlington Northern, Inc.*, 361 I.C.C. 482 (1979). In that decision, the Commission established rates on the basis of full cost at the current cost of capital level plus 7 percent. Rates based on 7 percent above the costs so developed would average 4.9 percent of the involved column 1820 rates (N.L.I. cask cars) in issue and 4.1 percent of the involved column 1830 rates (G.E. cask cars) in issue. Rates so constructed would be substantially below the level proposed by the protestants in their initial statement of facts and argument.

In addition to urging that the involved special trainload rates should be condemned as constituting an unreasonable practice prohibited under 49 U.S.C. 10701(a) and 10704(a)(1), the protestants claim that even if considered as optional rates, they exceed a

maximum reasonable level. As previously shown, protestants' evidence shows revenue/cost ratios of 335.3 to 688.9. Notwithstanding the foregoing, the protestants take the position that the reasonableness of the rates for transporting radioactive waste materials cannot be measured by the service involved in providing special trains which a shipper has not ordered and does not need. They urge that the variable costs for providing regular train service are appropriate here for measuring maximum reasonableness. The revenue/cost ratios for handling radioactive materials in regular car service range from 3652.4 to 3053.6 with an average ratio of 3353. The protestants stress that such fantastically high revenue/cost ratios conclusively demonstrate that the rates in issue exceed a maximum reasonable level.

Protestants do not contend that the Commission must or should establish a fixed revenue/cost ratio as the standard by which the maximum reasonableness of rates on all market dominance traffic must be based. Among other factors named as entitled to consideration is the value of service in the sense of the importance of maintaining a reasonable level of rates on the traffic. It is urged that by this standard the rates on radioactive materials should be relatively low since their movement is essential to the maintenance of an adequate supply of electric power. They do not believe that these are commodities which should be saddled with excessively high rates. Another factor cited for consideration is the going level of rates on these commodities. The only existing level of rates on radioactive materials is class 40 at which these commodities move throughout the rest of the United States. Inasmuch as the unrebutted cost evidence of record shows that the class 40 rates themselves are excessively high, the protestants contend that rates on any higher level would certainly be far above a maximum reasonable level.

Respondents' evidence.—A number of factors were taken into account by respondents in setting the special train service trainload rates in issue. The respondents combined the lowest existing classification rate on the commodities in tariff TL-CTR 1009 (at the Ex Parte No. 349 level) with an adjusted (and slightly lower) version of the special train rate or charge of the C&O/B&O Railroad (also at the Ex Parte No. 349 level)—the latter charge being substantially the same as the special train charge published by other eastern line railroads.

In support of the issue rates, the respondents offered cost justification based on the alleged inadequate insurance coverage under the Price-Anderson Act and past insurance indemnity

contracts under section 22 rates. The protestants' evidence convincingly rebuts respondents' evidence regarding alleged gaps and inadequacies in indemnity and insurance coverage. Nuclear liability arising out of all shipments of spent fuel or radioactive waste is insured under both the Facility Form purchased by the reactor operator, and by the indemnity provided by NRC to the reactor operator. Both the insurance and the indemnity agreement provide nuclear liability protection to anyone liable for injury or damage arising from the transport. Conrail pays an annual premium of $45,000 for a nuclear liability insurance policy issued by Suppler's and Transporter's. Conrail is the only respondent which has admitted having such coverage. In our view, the protestants' properly omitted such expense in developing their cost data. Respondents also argue that the costs should be inflated to cover additional expenses and risks due to the allegedly huge and incalculable cost of compliance with the multiplicity of Federal and local regulations which the future promises. We reject respondents' arguments directed to allegedly inflated cost items as being either too speculative or without sound factual basis. Contrary to the respondents' view that the NRC's new regulations under 10 CFR 73.37(a)(4) would increase railroad costs, those provisions are directed to the "licensee" (the shipper) and thus would increase shipper costs rather than rail costs.

Respondents submitted studies showing alleged savings in cask rental charges accuring from faster transit time under trainload service. Based on this study the use of trainload service round trip would save $32,670 cask rental per trip, over regular service round trip. These alleged reductions in transit times, however, are highly speculative. Protestants' expert operational witnesses have presented convincing testimony which rebuts such assumptions by the respondents. There is no tariff requirement that the railroads must expedite shipments under the trainload rates.

The respondents' stated objective for special train service is to assure insofar as possible that the effects of an accident will not be more severe than those contemplated by the cask testing standards promulgated by the NRC and DOT. Their expert operational witnesses testified that the effects of an accident during the course of using regular train service are likely to be more severe than those contemplated by the cask testing standards. They take the position that prudence and managerial discretion dictate that a service be offered which reduces the risk of highspeed impact and prolonged fire.

The respondents urge that we take into account their suppositions that (1) the revenues which will be generated by the trainload rates will be exceedingly small compared to the potential and foreseeable financial risks which the railroads will incure in transporting nuclear materials and (2) the rates under consideration are predicated on the judgment of the railroads that special and unusual procedures and precautions must be observed to assure the safe transportation of nuclear materials, not only for the benefit of the shippers but also for the protection of the public and the railroads.

Among the advantages foreseen by respondents for special train service are:

(1) reduced running speed; (2) reduced switching and less movement in yards; (3) increased ability to control speed, acceleration and deceleration; (4) shorter total transit time because of less switching and avoidance of yards; (5) reduced mass of the train; (6) the stopping of one train to permit another to pass; (7) the noninclusion in special trains of hazardous materials, particularly combustibles and explosives; (8) special routing to avoid bad trackage, high-population areas, and freight yards where cars containing other hazardous materials, including combustibles and explosives, may be present; (9) increased opportunity for observation and control by train crews due to the shorter length of the special train, lower noise levels, and lower dust levels; (10) the general tendency of train crews to be alerted to the special need for caution on special freight trains; (11) the presence in special trains of only the best rolling stock; (12) reduced free slack in the train, which lessens shock loads due to run-in and run-out; (13) reduced tendency to cause failure in the track structure; (14) reduced likelihood of coupler failure and trainline air hose failure; (15) reduced time of train in grade crossings; (16) elimination of hazards of derailment possibilities caused by other cars in train; and (17) reduced exposure of employees to radiation present even in a perfectly operating cask.

The respondents challenge protestants' assertion that the tariff schedules in issue "constitute safety regulations" in violation of congressional legislation conferring regulatory power on NRC and DOT. These agencies have adopted regulations and conditions which must be met in transportation of nuclear materials (see 18 U.S.C. 834; 42 U.S.C. 2201(b); and 49 U.S.C. 1804). According to the respondents, there is nothing in existing regulations or enabling legislation to preclude the railroads from imposing additional safeguards and nothing to suggest that the railroads are unreasonable in observing stricter standards, citing *Lehigh Valley R. Co.* v. *John Lysaght, Limited,* 271 F. 906 (2d Cir. 1921). Because nuclear technology is still in the formative stage, the respondents believe that it is much too early for anyone to say with confidence that current FRA, NRC or DOT regulations, or any other single set of rules applicable to transportation of radioactive materials, provides

sufficient protection or that the best techniques have been found for handling radioactive materials from the standpoint of minimizing foreseeable risks. They do not seek an affirmative finding that special train service is necessary in the movement of nuclear materials, but do seek a finding that the railroads' belief that special train service is necessary, in the present stage of the development of nuclear technology, is a reasonable, defensible, and well grounded premise and hence, a reasonable factor to be taken into account in establishing rates on these commodities. They further contend that the protestants' evidence, which allegedly boils down to rate-cost ratios, falls short of establishing the unreasonableness of the rates in issue. It is pointed out that the Commission in Ex Parte No. 270 (Sub-No. 4), *Investigation of Railway Frt. Rate Structure—Coal*, 345 I.C.C. 493 (1976), repudiated the off made contention that maximum reasonableness may be conclusively measured in terms of cost. They also rely on *General Motor Corp.* v. *New York Central R. Co.*, 311 I.C.C. 622, 625 (1960), and the decision in No. 34830, *West Coast Steel Users Freight Rate Committee* v. *Union Pacific Railroad Company*, (not printed), decided April 21, 1969 where the Commission held that the fact rates substantially exceed full cost does not establish that they are in excess of a maximum reasonable level.

Environmental and energy considerations.—The most important environmental issue here is the relative safety of two distinct types of rail operations, regular and special train service. An environmental impact statement (EIS) was issued by the Commission's Section of Energy and Environment on August 23, 1977. This impact statement treated this safety issue in detail. The impacts during both normal and accident conditions were considered.

The EIS indicates that in the event of accident, special train service will result only in a slightly less severe environmental impact. This conclusion was based on a study prepared by Sandia Laboratories. The study classified rail accidents into eight categories according to severity. It then assessed the likelihood that radioactive material would be released as a consequence of an accident of a particular severity. The chance of accident and the severity in each type of operation were analyzed. Then the risk was analyzed in terms of both early and latent cancer fatalities. The study concluded that the annual risk is one latent cancer fatality every 1,660 years while special train accidents would result in one latent cancer fatality every 6,250 years.

The risk of accident resulting in the loss of human life is extremely low using either regular train or special train operations. When viewed from a "worst case" analysis, regular train accidents would result in one latent cancer fatality every half year, while special train accidents would result in one latent cancer fatality every 5 years. The worst case analysis assumes that the containers would immediately break down altogether under testing slightly more severe than has yet been conducted. Sandia stated that this result would be extremely unlikely.

The EIS concluded that the risk from radiation exposure under nonaccident conditions is slightly greater when special train service is employed, but only to the extent of one additional fatality every 1,235 years. The EIS concluded that the total incremental environmental impact of special trains as opposed to regular trains is very small.

Discussion and Conclusions

There are three principal issues presented to us in this proceeding. First, we must decide whether the need for special handling of radioactive materials is sufficiently great to justify the operation of only special trains by the railroads, at considerable expense to shippers. For reasons discussed below, we conclude that it is not. Second, we must decide whether we should prescribe a rate or, instead, allow the carriers to file tariffs consistent with a maximum reasonable rate finding. We conclude that we should prescribe the rate. Third, we must determine the proper rate, and we have done so. In our judgment a rate level of approximately 7 percent of the revenue/variable cost ratio of the column 1820 and 1830 rates would cover all the costs of service, provide an adequate return on all related investments, and give the railroads an adequate incentive to maintain beneficial safety measures in the transportation of nuclear waste. We discuss these three issues in turn.

1. *Need for special train service.*—We are sensitive to respondents' claim that it is essential that special trains and special precautions be employed in the transportation of nuclear wastes. The railroads have a responsibility to protect their employees, their property, and the public from harmful radiation. For this reason, the safety evidence submitted by respondents has been received and considered. Further, it is ordinarily the railroads' prerogative to handle traffic as they see fit.

Nevertheless, we have strong evidence derived from the EIS that special train service would be for all practical purposes no safer than regular train service. The collateral attack through introduction of extensive evidence alleging the need for special train service attempted by respondents here against the conclusions of the EIS is not convincing. Similar or identical testimony to that presented again here was considered in the preparation of that statement. Further, as discussed previously in this decision, protestants convincingly contradicted respondents' evidence that special train service provides a higher level of service than is available under regular train movement. All available evidence supports the finding that, especially because of the ability of the casks to withstand stress, the use of special trains provides no cognizable safety benefit. No. 36325, *Radioactive Materials, Special Train Service, Nationwide*, (served August 24, 1977), affirmed by division 2 on March 13, 1978.

We can appreciate the desire to provide some added measure of safety where radioactive materials are involved. We are also reluctant to interfere with a management judgment as to how to conduct railroad operations. But we are not prepared to allow respondents to require a service which is several times as costly as regular service without (any) commensurate safety benefits. *Atchison, Topeka and Santa Fe RR Co.* v. *U.S.*, 232 U.S. 199, 217 (1914); *Oklahoma Grain via Wichita to Memphis*, 248 I.C.C. 767, 772 (1942). Thus, we (must) find that, based on the evidence at hand, the special train requirement is wasteful transportation and an unreasonable practice in violation of section 10701(a) of the act.

We remain deeply concerned about this problem and will be receptive to further evidence to demonstrate that special train or some other type of operation does actually result in a degree of safer transportation sufficient to warrant provision of only special train service. If substantial new evidence is made available, we will undertake whatever additional environmental analysis is necessary.

2. *Rate prescription versus maximum reasonableness finding.*—While we could limit our holding here to a finding of maximum reasonableness, we believe that in the circumstances presented here it is necessary to prescribe a rate level. Based on this record, we have concluded that the proposed rates, filed in purported compliance with our order in No. 36312, *supra*, are unlawful. Thus, respondents are in violation of that order. While we appreciate respondents' concerns, their actions make it obvious that they would be unwilling to publish rates at a level we consider to be

reasonable. The continuing controversy concerning the obligation to provide this service, the type of service necessary, and the rates themselves warrants our intervention at this time for the setting of rates fair to both sides. A rate prescription will also provide the immediate solution necessary so that these materials may be moved to disposal facilities. As we have noted, the majority of the spent fuel which would move in cask cars, has been stored at or near the plants and these storage facilities are severely limited.

In practice, the method we have chosen to implement the prescription (described below) will provide more flexibility to set rates throughout the territory than would a maximum reasonableness ceiling applied to each rate.

3. *The prescribed rate level.*—The rates published by the respondent railroads are predicated on the cost of special train service. As we have concluded that special train service is not justified, the rate level must be considered in relation to the cost of regular train service. The published rates are clearly unlawful when compared to the much lower cost of regular train service. As stated, the revenue/variable cost ratios approximate 3000 percent.

Nuclear wastes are now subject to the class 40 level in other rate territories. The ratio of the class 40 level of rates to variable cost for regular train service is 1095.8 in G.E. cask cars and 1039.5 in N.L.I. cask cars.

However, these class rates have not been judged by the Commission, nor do we know the extent of their use. Adoption of the class 40 rates here would result in revenues of five or six times the fully allocated cost of service. We think this produces a greater return on these movements than the railroads need to justify related investment. The shippers should not be made to pay rates which so greatly exceed the cost of providing service. Thus, we do not think it appropriate to use these rates as a model for eastern rates.

While respondents' reference to *General Motors, supra,* and other decisions holding that reasonableness may not be conclusively measured in terms of cost is well taken, this principle does not require approval of the rates proposed. In market dominant situations, such as this one, we have an obligation to protect the captive shipper from abuse in carrier ratemaking. Here, we have not been provided with sufficient acceptable evidence to justify rates so much above the cost of service as the ones proposed.

Protestants other than government agencies request that we prescribe a rate level based on 7 percent of the revenue/variable cost ratio under the proposed column 1820 and 1830 rates. This

proposal would result in ratios of 213.8 and 255.7, respectively, for representative movements of N.L.I. and G.E. cask cars shown in this record. As noted, the approach taken in *San Antonio, supra,* would produce rates averaging 4.9 percent of the column 1820 rates and 4.1 percent of the column 1830 rates.

Most of the Commission's recent experience in prescribing rates has been with regard to particular unit-train movements of coal. In *San Antonio, supra,* and other coal cases, the Commission carefully considered the cost of service for each movement. A plant investment additive was included in Rail Form A costs to reflect more closely the actual cost of service. Here we are concerned with prescribing a rate for a whole territory and the costs of record are for representative movements only. Further, we are dealing with a commodity which does require additional precautions in some circumstances. We think it is proper to allow a slightly higher ratio than we would otherwise allow to give the railroads some latitude in the handling of these commodities. Obviously, we are dealing here with a particular set of facts and our conclusions are limited to these circumstances. In our view, a rate level of approximately 7 percent of the revenue/variable cost ratio of the column 1820 and 1830 rates would cover all the costs of service and provide an adequate return on all related investments. In addition it should give adequate incentive for the railroads to maintain beneficial safety measures in the transportation of nuclear waste. As protestants have shown their willingness to pay rates at this revenue/variable cost level, we will prescribe it.

As this prescription is territorywide, we believe it appropriate to adopt a similar approach to the one we took in Ex Parte No. 319, *Investigation of Frt. Rates Recyclable Commodities,* 361 I.C.C. 238 (1979). That is, the prescribed ratio to be used in setting rates applies to the territory as a whole. Particular rates need not produce this exact ratio, but the average ratio for all movements in the territory may be no more than 213.8 for N.L.I. cask cars and 255.7 for G.E. cask cars.

Ultimate Findings

We find that the assailed special trainload rates in issue are unjust and unreasonable and in violation of 49 U.S.C. 10701. A reasonable level of rates under regular train service is prescribed, reflecting average territory revenue/cost ratios of 255.7 for G.E. cask cars and 213.8 for N.L.I. cask cars, based on the costs developed in appendix D.

We also find that the railroads have failed to publish reasonable and otherwise lawful tariff provisions covering the transportation of the involved materials and thus are in violation of division 2's order in No. 36312, *supra*.

This decision will not significantly affect either the quality of the human environment or conservation of energy resources.

COMMISSIONER STAFFORD, concurring, in part:

I would require the cancellation of the flag outs from the classification.

COMMISSIONER ALEXIS, concurring:

Generally the Commission has found a rate in the range of 180 percent of variable costs to be compensatory for market dominate traffic; I believe such a rate would be compensatory here also. However, as protestants have shown their willingness to pay a higher rate, I agree with the majority of the Commission that the higher rate should apply.

It is ordered:

The respondent railroads are required and directed within 30 days from the service date of this decision to cancel the rates under investigation and to publish and maintain regular trainload service rates on the involved traffic at the levels prescribed in this decision, based on the costs developed in appendix D.

This decision shall continue in force until further decision of the Commission.

The respondents are required and directed to refund with interest the amounts collected pursuant to the keep-account directives to the extent they exceed the prescribed rates.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, and Alexis. Commissioner Stafford concurring in part with a separate expression. Commissioner Alexis concurring with a separate expression.

(SEAL)

AGATHA L. MERGENOVICH,
Secretary.

APPENDIX A

Revenue/cost ratios for movements of radioactive material—regular train service and single-car rates in proposed tariff

	GE cask cars			NLI cask cars		
	Revenue	Cost	Revenue/ cost ratio	Revenue	Cost	Revenue/ cost ratio
	(1)	(2)	(3)	(4)	(5)	(6)
			Percent			*Percent*
CR						
To Streator, IL from Oswego, NY	$24,208	$686.63	3525.6	$25,565	$866.86	2949.2
Do Oyster Creek, NJ	30,824	875.62	3520.3	32,408	1,110.23	2919.0
Do Buchanan, NY	32,293	907.96	3556.7	33,390	1,151.86	2945.6
Do Middleton, CT	31,540	944.36	3339.8	33,148	1,198.17	2766.7
To Divine, IL via Pine, IN (UP) from Waterford, CT	32,293	1,080.52	2988.7	33,930	1,356.31	2501.6
To Winston-Salem, NC via Hagerstown, MD (NW) from Oswego, NY	24,788	594.02	4172.9	26,165	740.61	3532.9
Do Oyster Creek, NJ	20,017	474.45	4219.0	21,212	586.64	2615.9
Do Buchanan, NY	20,017	558.95	3581.2	21,212	695.45	3050.1
Do Middletown, CT	21,161	569.28	3717.2	22,392	708.74	3159.4
CO						
To Richmond, VA from Benton Harbor, MI	27,242	698.34	3901.0	28,710	885.82	3241.1
To Cincinnati, OH from Midland, MI	12,798	408.25	3134.8	13,709	512.26	2676.2
To E. St. Louis, IL from Newport News, VA	32,293	674.72	4786.1	33,930	855.40	3966.6
Average			3652.4			3053.6

APPENDIX B

Revenue/cost ratios for movements of radioactive material—class 40 train service and single-car rates in proposed tariff

	G.E., cask cars			N.L.I. cask cars		
	Revenue	Cost	Revenue/ cost ratio	Revenue	Cost	Revenue/ cost ratio
	(1)	(2)	(3)	(4)	(5)	(6)
			Percent			*Percent*
CR:						
To Streator, IL from Oswego, NY	$7,488	$686.63	1090.5	$8,944	$866.86	1031.8
Do Oyster Creek, NJ	8,766	875.62	1001.1	10,471	1,110.23	943.1
Do Buchanan, NY	9,018	907.96	993.2	10,772	1,151.86	935.1
Do Middleton, CT	8,892	944.36	941.6	10,621	1,198.17	886.4
To Divine, IL via Pine, IN (EJE) from Waterford, CT	9,018	1,080.52	834.6	10,772	1,356.31	794.2
To Winston-Salem, NC via Hagerstown, MD (NW) from Oswego, NY	7,596	594.02	1278.7	9,073	740.61	1225.1
Do Oyster Creek, NJ	6,552	474.45	1381.0	7,826	586.64	1334.0
Do Buchanan, NY	6,552	558.95	1172.2	7,826	695.45	1125.3
Do Middletown, CT	6,912	569.28	1214.2	8,256	708.74	1164.9
CO:						
To Richmond, VA from Benton Harbor, MI	8,100	698.34	1159.9	9,675	885.82	1092.2
To Cincinnati, OH from Midland, MI	4,932	408.25	1208.1	5,891	512.26	1150.0
To E. St. Louis, IL from Newport News, VA	9,018	674.72	1336.6	10,772	855.40	1259.2
Average			1095.8			1039.5

APPENDIX C

Fully allocated cost plus current cost of capital of radioactive material in regular train service compared with rates in proposed tariff and with class 40 rates

	G.E. cask cars			N.L.I. cask cars		
	Cost	Column 1830 revenue	Class 40 revenue	Cost	Column 1820 revenue	Class 40 revenue
CR:						
To Streator, IL from Oswego, NY	$919.96	$24,208	$7,488	$1,162.19	$25,565	$8,944
Do Oyster Creek, NJ	1,173.83	30,824	8,766	1,489.14	32,408	10,471
Do Buchanan, NY	1,217.17	32,293	9,018	1,545.09	33,930	10,772
Do Middleton, CT	1,265.49	31,540	8,892	1,607.32	33,148	10,621
To Divine, IL via Pine, IN (EJE) from Waterford, CT	1,452.19	32,293	9,018	1,823.61	33,930	10,772
To Winston-Salem, NC via Hagerstown, MD (NW) from Oswego, NY	851.01	24,788	7,596	1,063.18	26,165	9,073
Do Oyster Creek, NJ	690.42	20,017	6,552	856.38	21,212	7,826
Do Buchanan, NY	803.88	20,017	6,552	1,002.56	21,212	7,826
Do Middletown, CT	817.74	21,161	6,912	1,020.42	22,392	8,256
CO:						
To Richmond, VA from Benton Harbor, MI	1,000.31	27,242	8,100	1,268.75	28,710	9,625
To Cincinnati, OH from Midland, MI	584.96	12,798	4,932	734.79	13,709	5,891
To E. St. Louis, IL from Newport News, VA	966.52	32,293	9,018	1,225.16	33,930	10,772
Average	978.62	25,790	7,737	1,233.22	27,193	9,237

APPENDIX D

Movement cost

Line No.	Item	Source	GE cask car	NLI cask car
	(1)	(2)	(3)	(4)
	One cask car: Loaded train			
1.	Origin terminal	W.T.2, L.7	$200.81	$200.81
2.	Origin rail miles	W.T.1, L.15	850.0	850.0
3.	Origin rail cost per mile	W.T.2, L.37—cents	1122.939	1133.196
4.	Origin train—line-haul cost	L.2xL.3	$9,544.98	$9,632.17
5.	Origin interchange	W.T.2, L.11	51.58	51.58
6.	Total loaded movement	Sum. L.1,4,5	9,797.37	9,884.56
	Three cask cars: Loaded train			
7.	Origin terminal	W.T.2, L.15	316.56	316.56
8.	Origin rail miles	W.T.1,L.15	850.0	850.0
9.	Origin rail cost per mile	W.T.2, L.44—cents	1191.311	1222.083
10.	Origin train—line-haul cost	L.8xL.9	$10,126.14	$10,387.71
11.	Origin interchange	W.T.2, L.17	79.55	79.55
12.	Total loaded movement	Sum. L.7,10,11	10,522.25	10,783.82
	Five cask cars: Loaded train			
13.	Origin terminal	W.T.2, L.21	432.31	432.31
14.	Origin rail miles	W.T.1,L.15	850.0	850.0
15.	Origin rail cost per mile	W.T.2, L.51—cents	1258.458	1309.744
16.	Origin train—line-haul cost	L.14xL.15	$10,696.89	$11,132.82
17.	Origin interchange	W.T.2, L.23	107.51	107.51
18.	Total loaded movement	Sum. L.13,16,17	11,236.71	11,672.64

APPENDIX E

APPENDIX E

INTERSTATE COMMERCE COMMISSION

Decision

Investigation and Suspension Docket No. 9205[1]

TRAINLOAD RATES ON RADIOACTIVE MATERIALS, EASTERN RAILROADS

Decided: July 10, 1980

Served: July 17, 1980

A number of petitions have been filed since our April 11, 1980 decision in this proceeding (362 I.C.C. 756). Each will be discussed separately.

1. *Department of Energy (DOE)* - DOE seeks a supplemental order resolving two issues.[2] While not clearly stated, it appears to request that the Commission require the Eastern carriers to enter into reasonable joint rates (using the prescribed basis) with carriers in other territories. This relief is outside the scope of this proceeding. This investigation dealt only with specific rates proposed for Eastern territory.

DOE points out our prescription order applies only to rates in the 1820 and 1830 columns. Thus, we failed to address the reasonableness of the column 1810 rates, under which most government shipments move, and may not have fully considered the rates for empty movements in the column 1810 range. While DOE suggests that the first omission may be corrected by applying our April 11 prescription to all the rate columns, resolution of these issues is not this simple. DOE fails to consider the fact that we prescribed a different ratio for each column. Additional analysis will be required to

---

[1] This decision also embraces Investigation and Suspension Docket No. 9205 (Sub-No. 1), Trainload Rates on Radioactive Materials, Eastern Railroads.

[2] DOE also replied to the Eastern Railroads' petition, agreeing with protestants other than Federal Agencies' compliance analysis (discussed, *infra*).

develop a prescription for the 1810 range of rates. This proceeding will be reopened to consider this issue.

In its reply to the railroads' petition, it also seeks to introduce new evidence to establish a reasonable basis for prescribing a ratio on the column 1810 rates. DOE presents no reasons why this evidence was not presented earlier. We remind DOE that, to the extent it seeks specific relief in an investigation proceeding, it has the duty to present *at the proper time* sufficient evidence to support the relief it requests. Considering the importance of this case, however, and our interest in reaching consistent results for each group of rates, we will accept this new evidence in the reopened proceeding. DOE will be given an additional 20 days to submit whatever other evidence it may consider necessary to justify a particular prescription. Defendants will then be given 30 days to reply and, thus, will not be prejudiced.

Regarding empty movements, we believe clarification of the April 11 decision is necessary. Our reference to the column 1820 and 1830 rates was intended to encompass the various scales of rates (varying by number of cars and whether loaded or empty) within each of these 2 groups. Rather than relating our revenue/cost analysis to each particular rate column, we approached the issue based on the type of cask car used. We analyzed the highest rates in each group, i.e. the first column, single car-loaded. To analyze each column with each group (10 columns in each) would have been a tremendous undertaking and not necessary to the development of an average maximum reasonable rate for the territory. Accordingly, the column 1820 and 1830 prescriptions apply to every column within the respective group.

II. *Eastern Railroads* - Respondent railroads have sought clarification in order that they may implement properly the decision. Postponement of the compliance date is also requested.

Respondents are correct in noting that the reference to Appendix D in our ordering paragraphs was incorrect. The

proper reference is Appendix A. Respondents' proposal for compliance is incorrect, as it relies on Appendix D figures. Acceptable methods of compliance are discussed in the next section. The compliance date for the publication of revised rates in columns 1820 through 1839 will be 30 days from the service date of this decision.

III. *Protestants Other Than Federal Agencies* — These protestants also point out the incorrect reference to Appendix D. In addition, they note that compliance is easily accomplished by publishing rates at 7 percent of the proposed levels. While this is not entirely accurate, it is correct if "rate" is read to mean "revenue." Thus, in Appendix A, rates producing 7 percent of the revenue in each example, assuming the cost remains constant, would comply with our decision. Of course, the railroads are free to develop the new rates using other means. However, the average territorial ratio may not exceed 213.8 for N.L.I. cask cars under columns 1820-1829 or 255.7 for G.E. cars under columns 1830-1839.

IV. *Other Matters* — One other issue must be raised. The proposed rates also include columns 1840-1849, applying on smaller cars (142,000 lbs.). Little or no evidence was presented concerning these rates nor do the latest round of filings refer to them. If parties desire a rate prescription here, they must present sufficient evidence within 20 days to justify establishment of a ratio and defendants will have 30 days to reply. The reopened proceeding will consider this matter. If a reliable ratio cannot be formulated, respondents will be required, consistent with our prior findings that they must provide service on these commodities, to publish column 1840-1849 rates consistent with this decision.

IT IS ORDERED:

The petitions are granted in part. This proceeding is reopened on the present record to consider the lawfulness of the column 1810-1819 rates. The proceeding is also reopened to take evidence on the need for a prescription for the column 1840 range of rates. Additional evidence may be submitted following the schedules set forth in this decision.

References to Appendix D at page 775 (last line) and page 776 (line 22) are amended to refer to Appendix A.

Respondents are directed to comply with the April 11, 1980 decision, as amended and clarified here, within 30 days of the service date of this decision and to comply with the refund order to the extent the column 1820 and 1830 groups of rates are involved.

This action does not significantly affect the quality of the human environment or the conservation of energy resources.

By the Commission, Chairman Gaskins, Vice-Chairman Gresham, Commissioners Stafford, Clapp, Trantum, Alexis, and Gilliam.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

Opposition

1

Office - Supreme Court, U.S.
FILED
SEP 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-336

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CONSOLIDATED RAIL CORPORATION, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS COMMONWEALTH EDISON COMPANY, *ET AL.* IN OPPOSITION

CHARLES J. MCCARTHY*
BELNAP, MCCARTHY, SPENCER, SWEENEY & HARKAWAY
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 393-5710

Attorney for Respondents GPU Service Corp., et al.

DONALD MACLEAY*
JAMES F. BROMLEY
MACLEAY, LYNCH, BERNHARD, GREGG & ATTRIDGE
1625 K Street, N.W.
Washington, D.C. 20006
(202) 393-3390

Attorneys for Respondent General Electric Company

LEONARD M. TROSTEN
HARRY H. VOIGT*
MICHAEL F. MCBRIDE
MINDY A. BUREN
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Ave., N.W.
Suite 1100
Washington, D.C. 20036

(202) 457-7500
Attorneys for Respondents Commonwealth Edison Company, et al.

September 1981

* *Counsel of Record.*

QUESTIONS PRESENTED

1. Should certiorari be granted where the decision of the Court below is fully supported by an alternative ground not embraced within the Petition, *viz.*, that the finding of the Interstate Commerce Commission ("Commission") that special train service for shipments of spent nuclear fuel and radioactive waste ("radioactive materials") is unnecessary and would constitute wasteful transportation has adequate support in the record?

2. Whether the Commission and the Court below committed "obvious error" in concluding that there is sufficient evidence of record to find that special train service for shipments of radioactive materials is unnecessary and would constitute wasteful transportation?

3. Where the Nuclear Regulatory Commission ("NRC") and the Department of Transportation ("DOT"), in the exercise of their statutory authority, have issued detailed regulations governing the transportation of radioactive materials which do not require the use of special trains and the NRC has expressly rejected a railroad proposal for a special train requirement on the ground that "[n]eeded protection requirements for rail shipments can be met by regular trains", are Petitioners entitled to a further opportunity to rebut the presumption arising from such regulations that special trains are unnecessary on the theory that they were unaware of the existence of such presumption prior to the decision of the Court below?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-336

CONSOLIDATED RAIL CORPORATION, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS COMMONWEALTH EDISON COMPANY, *ET AL.* IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-31a) is reported at 646 F.2d 642. The opinion of the Interstate Commerce Commission (Pet. App. 1d-26d) is reported at 362 I.C.C. 756.

JURISDICTION

The judgment of the Court of Appeals was entered on February 26, 1981. Pet. App. 1a. A timely petition for rehearing and rehearing *en banc* was denied on April 3, 1981. Pet. App. 1b and 1c. On June 19, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari to August 31, 1981. The petition was filed on August 20, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1976).

STATEMENT

Petitioners seek review of a decision of the Court of Appeals affirming an order of the Commission which held that mandatory special train service for the transportation of radioactive materials would constitute wasteful transportation and an unreasonable practice and that rates published by the eastern railroads premised on the use of special train service were unreasonable in violation of 49 U.S.C. §10701(a) (Supp. III 1979).[1]

Responsibility for regulating the transportation of radioactive materials is shared by DOT and NRC. DOT has primary responsibility for establishing rules for the safe transportation of hazardous materials and NRC has responsibility for establishing rules governing the possession and use of radioactive materials. NRC has primary responsibility for implementing the national policy of achieving a proper balance between adequate safety and the promotion of nuclear energy.

Pursuant to their statutory authority, NRC and DOT have adopted complementary regulations governing the transportation of radioactive materials. *See* Pet. App. 13a-17a. The NRC regulations on packaging require that the casks meet very stringent tests[2] which are designed to permit the carrying of radioactive materials in regular train service.

Neither set of regulations requires special train service. NRC specifically rejected a proposal by the railroads that it require special train service for radioactive materials on the ground that "'[n]eeded protection requirements for rail shipments can be met by regular trains.'" Pet. App. 21a. The railroads did not seek judicial review of that ruling.

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[1] The Commission prescribed rates approximately 7 percent of the published rates. That the prescribed rates are proper rates for transportation in regular train service has not been questioned by Petitioners.

[2] The description of the tests in the Petition is grossly inaccurate and misleading. For example, the 30-foot fall test is onto an *essentially unyielding* surface, not a mere "flat surface", as stated in the Petition at 3. *See* Pet. App. 16a n.13. The significance of this difference is explained in the Final Environmental Impact Statement (II JA pp. 9-27, 9-28).

In issuing the order that was affirmed by the Court below, the Commission was not writing on a clean slate. The safety contentions raised by Petitioners had already been considered and rejected in three previous proceedings in which the railroads had submitted testimony similar to that presented in the proceeding reviewed by the Court below.[3]

Until 1975, all of the nation's railroads, except Petitioners, handled radioactive materials in regular train service under tariff provisions. Petitioners refused to handle such materials except under contract. In that year, the southern and western railroads filed tariff amendments which provided for the handling of such materials only in special train service. In *Radioactive Materials, Special Train Service, Nationwide*, 359 I.C.C. 70 (Div. 2, 1978), the Commission held that such tariff provisions violated then Section 1 of the Interstate Commerce Act[4] and ordered them cancelled. The southern and western railroads did not seek judicial review. They operate today under tariffs that require them to handle radioactive materials in regular train service.

In 1976, these Respondents,[5] other companies, and the U.S. Energy Research & Development Administration filed complaints with the Commission alleging that Petitioners had failed to comply with their common carrier responsibility to

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[3] Radioactive Materials, Missouri-Kansas-Texas R.R., 357 I.C.C. 458 (Div. 2, 1978); Radioactive Materials, Special Train Service, Nationwide, 359 I.C.C. 70 (Div. 2, 1978); U.S. Energy Research & Development Administration v. Akron C. & Y. R.R., 359 I.C.C. 639 (Div. 2, 1978), *aff'd sub nom.* Akron, C. & Y. R.R. v. ICC, 611 F.2d 1162 (6th Cir. 1979), *cert. denied*, 449 U.S. 830 (1980).

[4] Section 1(4) of the Act made it the duty of every common carrier to establish "just and reasonable rates, fares, charges and classifications". This section was codified in 49 U.S.C. §10701(a) (Supp. III 1979) which, at the time of the Commission decision affirmed by the Court below, read in pertinent part as follows:

> (a) A rate, classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable.

[5] The Respondents are listed in footnote 3 to the Petition. A list of parents, subsidiaries, and affiliates of these Respondents is set forth in the Addendum to this Brief.

publish tariffs for radioactive materials. Lengthy administrative proceedings were held in which Petitioners presented substantially the same testimony on the safety issue as that reviewed by the Court below and these Respondents answered such testimony. The Commission held that Petitioners had a duty to carry the involved commodities as common carriers and ordered them to publish appropriate tariffs. *U.S. Energy Research & Development Administration v. Akron, C. & Y. R.R.*, 359 I.C.C. 639 (1978).

Petitioners sought review of the Commission's order in the United States Court of Appeals for the Sixth Circuit. That Court affirmed the Commission's order. *Akron, C. & Y. R.R. v. ICC*, 611 F.2d 1162 (6th Cir. 1979). Certiorari was denied. 449 U.S. 830 (1980).

Petitioners then filed tariffs premised on the carriage of the involved commodities in special train service. These Respondents and the Department of Energy (the statutory successor to the Energy Research and Development Administration) challenged the special train requirement as an unreasonable practice and the published rates as unreasonably high. The Commission instituted an investigation, took written evidence from the parties, and issued the decision and order described above. 362 I.C.C. 756 (1980).

On February 26, 1981, the Court of Appeals affirmed the Commission's order in a comprehensive opinion. Pet. App. 1a-31a. Rehearing was denied (with the deletion of one sentence of the opinion, as to an issue not material here) (Pet. App. 1b-2b) and rehearing *en banc* was denied (one judge voting for rehearing *en banc*) (Pet. App. 1c-2c).

The Court of Appeals held that the Commission had the power to approve safety measures beyond those mandated by NRC and DOT, but that it properly deferred to the expertise and primary jurisdiction of those agencies in determining what safety measures are necessary and also in deciding whether special train service would produce benefits commensurate with its cost. Pet. App. 17a-18a. The Court below pointed out that the presumption that special train service is not necessary was

fully applicable because (1) NRC and DOT had not undertaken merely to prescribe minimum standards but had attempted to "satisfy fully their statutory duty to assure the safe transportation of radioactive materials" and (2) NRC had specifically considered a proposed requirement for special train service and rejected it as unnecessary. Pet. App. 20a-22a. The Court of Appeals also noted the absence of any evidence as to distinguishing characteristics of Petitioners that would make special train service necessary for them but not for railroads generally. Pet. App. 22a.

The Court of Appeals, however, did not stop at this point. It held that, in any event, there was ample evidence of record to justify the Commission's conclusion that special train service for the involved commodities would constitute a "wasteful" practice for which no corresponding safety benefit would be achieved and that the published rates were unreasonable. Pet. App. 23a-31a. That holding is nowhere referred to in the Petition.

ARGUMENT

Petitioners argue that the Court of Appeals imposed a new burden of proof on them for the first time and that, therefore, the proper result should have been a remand to give them an opportunity to meet their burden, rather than simply to affirm. But the Court of Appeals imposed no new burden of proof on Petitioners. Even more importantly, the Court of Appeals affirmed the Commission on a completely separate ground—an alternative holding conveniently ignored by Petitioners.

1. The Court of Appeals held that the regulations of NRC and DOT establish a presumption that special train service for radioactive materials is unnecessary and that Petitioners had not carried their burden of overcoming that presumption. Pet. App. 11a-22a. That burden was not new to the D.C. Circuit's opinion. The Sixth Circuit said essentially the same thing in its opinion. *Compare* 611 F.2d at 1169-70 *with* Pet. App. 18a-19a. Petitioners must have been aware that the regulations and determinations of NRC and DOT, like those of all federal

agencies, are entitled to a presumption of validity. *E.g., In re Permian Basin Area Rate Cases*, 390 U.S. 747, 768 (1968); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).

Petitioners fully understood the burden placed upon them. The testimony they presented on the safety issue was addressed to the adequacy of the NRC and DOT regulations. Pet. App. 30a. It is preposterous for Petitioners now to contend that they first learned of their burden when they read the D.C. Circuit's opinion.

2. In any event, the Court below independently analyzed the record and held that, without resort to any presumption against special train service, the Commission's findings were supported by substantial evidence and were correct. Pet. App. 23a-30a.

This is an independent ground (not embraced within the question presented by Petitioners) which would fully support the judgment of the court below even had that court been in error in holding that DOT and NRC regulations establish a presumption against a need for special train service. *Cf. The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959).

The Court below stated:

> The ICC's opinion, however, reveals that the Commission did not explicitly rely on DOT and NRC regulations to establish a presumption against a need for STS [special train service], though it would have been proper to do so. *Cf. Eastern Railroads, supra*, 362 ICC at 759, 764. Instead, the Commission examined the evidence it had before it without resorting to any presumption against STS, and still concluded that STS provided no cognizable safety benefit, and hence that expenditures for it and the tariffs based upon it were unreasonable. We are satisfied from our examination of the record made before the Commission that sufficient evidence existed to support its conclusion that STS was unnecessary for safety reasons, even without the presumption

> against STS arising from the DOT/NRC regulations, which we believe the Commission should have taken into account.

Pet. App. 23a. Petitioners should be barred from relitigating that issue because their so-called safety evidence has been rejected by both the Commission and the Court of Appeals. *American Textile Mfrs. Institute, Inc. v. Donovan*, 101 S. Ct. 2478, 2497 (1981); *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 309-10 (1974) (citing cases); *cf. Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("very obvious and exceptional showing of error" required).

3. Petitioners argue that the Commission should not have relied on the Final Environmental Impact Statement ("FEIS") in reaching its conclusions because the FEIS was not introduced in evidence and that they were surprised by the Commission's reliance on it. The Court succinctly disposes of this argument at Pet. 28a-29a, but an additional observation is pertinent.

The Commission's then-existing rules expressly provided for reliance on an EIS not introduced in evidence:

> The Commission may take official notice of any facts relating to the environmental situation before it. This shall include facts set forth in documents such as scientific studies, environmental impact statements, governmental reports, and maps, which have not been presented in evidence by any party of record. In the event any decision rests upon official notice of any such fact, any party may, within a period allowed for the filing of exceptions or petitions for reconsideration, request an opportunity to show the contrary.

49 C.F.R. §1108.19 (1980).

If Petitioners had, in fact, been surprised by the Commission reliance on the EIS, they could have requested an opportunity to contest the facts from the EIS relied on in the Commission decision. They did not do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES J. MCCARTHY*
BELNAP, MCCARTHY, SPENCER, SWEENEY & HARKAWAY
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 393-5710

Attorney for Respondents GPU Service Corp., et al.

DONALD MACLEAY*
JAMES F. BROMLEY
MACLEAY, LYNCH, BERNHARD, GREGG & ATTRIDGE
1625 K Street, N.W.
Washington, D.C. 20006
(202) 393-3390

Attorneys for Respondent General Electric Company

LEONARD M. TROSTEN
HARRY H. VOIGT*
MICHAEL F. MCBRIDE
MINDY A. BUREN
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Ave., N.W.
Suite 1100
Washington, D.C. 20036

(202) 457-7500
Attorneys for Respondents Commonwealth Edison Company, et al.

September 1981

* *Counsel of Record.*

ADDENDUM

Listing of Parents Subsidiaries, and Affiliates of Respondents Submitting this Brief

ADDENDUM

Party	Parent(s)	Subsidiaries and Affiliates
Commonwealth Edison Company	—	Chicago & Illinois Midland Railway Company
		Commonwealth Edison Company of Indiana, Inc.
		Commonwealth Research Corporation
		Concomber, Ltd.
		Cotter Corporation
		Edison Development Canada, Inc.
		Edison Development Company
		Medical Center Steam Company
		72 West Adams Company
Exxon Nuclear* Company, Inc.	Exxon Corporation	Exxon Nuclear Development Company, Inc.
		Exxon Nuclear GmbH
		Exxon Nuclear Idaho Company, Inc.
		Exxon Nuclear International, Inc.
		Exxon Pipeline Company
		Imperial Oil, Limited
		Jersey Nuclear-Avco Isotopes, Inc.
		Reliance Electric Company
General Electric Company	—	Adobe Canyon Corporation
		Alton Minerals, Inc.
		Alton Mining Corporation
		Atlantic Plant Maintenance, Inc.

* Because Exxon Corporation has hundreds of subsidiaries and affiliates throughout the world, and because the purpose of this certificate is to permit Justices of this Court to ascertain the need for recusal or disqualification, the subsidiaries and affiliates of Exxon Nuclear Company, Inc. are listed, but only those subsidiaries and affiliates of Exxon Corporation whose stock or debt securities are publicly traded in the United States or Canada are listed.

Party	Parent(s)	Subsidiaries and Affiliates
		Bay Farm Island, Inc.
		Benerson Corporation
		Biological Energy Corporation
		Business Development Services, Inc.
		Castle Oaks Corporation
		Diamond Oaks Corporation
		East Erie Commercial Railroad
		ECOGE/U.S., Inc.
		Evansville Cable TV, Inc.
		Fremont Development, Inc.
		General Electric Asia Capital Corporation
		General Electric Broadcasting Company, Inc.
		General Electric Broadcasting Company of Colorado, Inc.
		General Electric Cablevision Corporation
		General Electric Information Services Company
		General Electric International Operations Company, Inc.
		General Electric International Sales Company
		General Electric Investment Corporation
		General Electric Overseas Capital Corporation
		General Electric Radio Services Corporation
		General Electric Real Estate Credit Corporation
		General Electric Realty Corporation
		General Electric Technical Services Company, Inc.
		General Electric Uranium Management Corporation

Party	Parent(s)	Subsidiaries and Affiliates
		General Electric Video, Inc.
		GESUB of Delaware, Inc.
		Isla del Sol, Inc.
		Kun-Yong of Korea, Ltd.
		Ladd Exploration Company
		Ladd Overseas Corporation
		Ladd Petroleum Corporation
		LVO Data Systems, Inc.
		Management and Technical Services Company
		Marcona Greenland Company
		Marcona, Inc. (Delaware)
		Marcona Mining Company
		Marcona (N.Z.) Company
		Marcona New Zealand, Inc.
		Marcona Ocean Industries, Ltd.
		Mariposa Mining Company
		Matewan Minerals, Inc.
		Middle East Technical Services Company
		Midwest Electric Products, Inc.
		Minera Utah de Chile, Inc.
		Minera Utah de Colombia, Ltd.
		Parker Country Pipeline Company
		Petaluma Center, Inc.
		Rolling Hills Corp.
		Sadelmi New York, Inc.
		San Juan Coal Company
		Sierra Coal Company
		Southern Sphere Holdings, Ltd.
		Springer Mining Company, Inc.
		Tau Epsilon Music, Inc.
		Tomorrow Syndication, Inc.
		Trafalgar Community Developers, Inc.

Party	Parent(s)	Subsidiaries and Affiliates
		Trafalgar Developers of Florida, Inc.
		Trafalgar Developers, Inc.
		UII Corporation
		Uintah Corporation
		Utahsub, Inc.
		Utah Australia Limited
		Utah Construction & Mining Co.
		Utah Development Company
		Utah Exploration, Inc.
		Utah Far East, Inc.
		Utah International, Inc.
		Utah International Finance Corp.
		Utah-Marcona Corporation
		Utah Mines, Ltd.
		Utah Mining Company
		Utah Pacific, Inc.
		Utah Saudi Arabia, Inc.
		Utah South Africa, Inc.
		Vandenberg Village Development Company
		Victor X-Ray Corporation
		Creative Credit Services, Inc.
		Full Service Leasing Corporation
		Gannett Flight Operations Corporation
		GECC Escrow Services, Inc.
		GECC Financial Corporation
		GECC Hawaii Leasing Corporation
		General Electric Credit Auto Lease, Inc.
		General Electric Credit Corporation
		General Electric Credit Corporation of Delaware
		General Electric Credit Corporation of Georgia
		General Electric Credit Corporation of Tennessee

Party	Parent(s)	Subsidiaries and Affiliates
		General Electric Credit and Leasing Corporation
		General Electric Mortgage Insurance Corporation
		Homemakers Finance Service, Inc.
		Homemakers Loan & Consumer Discount Company
		Monogram General Agency of Texas, Inc.
		Monogram General Insurance Agency, Inc.
		Palm Beach Credit Corporation
		Pleserby, Inc.
		Puritan Insurance Company
		Puritan Life Insurance Company
		Stang Associates, Inc.
		Little Medicine Development Company
		Lucky Mc Exploration Corp.
		Lucky Mc Uranium Corporation
		Pathfinder Mines Corp.
		Pathfinder Mines Corporation
		Shirley Basin Service Company
GPU Service Corporation	General Public Utilities Corporation	GPU Nuclear Corporation
		Jersey Central Power & Light Company
		Metropolitan Edison Company
		Pennsylvania Electric Company
Houston Lighting & Power Company	Houston Industries, Inc.	Primary Fuels, Inc.
		Utility Fuels, Inc.
Kansas City Power and Light Company	—	Utility Fuel Company
		WYMO Fuels, Inc.
		Red Hill Coal Company

Party	Parent(s)	Subsidiaries and Affiliates
Kansas Gas and Electric Company	—	Utility Fuel Company
Niagara Mohawk Power Corporation	—	Beebee Island Corporation
		Canadian Niagara Power Company, Ltd.
		Empire State Electric Energy Research Corporation
		Empire State Power Resources, Inc.
		HYDRA-CO. Enterprises
		The Indian River Company
		Moreau Manufacturing Company
		Niagara Mohawk Finance, N.V.
		NM Uranium, Inc.
		Nuclear Electric Insurance, Ltd.
		St. Lawrence Power Company
		Utilities Mutual Insurance Company
Northern States Power Company	—	Chippewa and Flambeau Improvement Company
		Cormorant Corporation
		Northern States Power Company, a Wisconsin Corporation
		United Power and Land Company
Pacific Gas and Electric Company	—	Alaska California LNG Company
		Alberta Natural Gas Company
		Alberta and Southern Gas Co. Ltd.
		Calaska Energy Company
		Eureka Energy Company
		Gas Lines, Inc.
		Natural Gas Corporation of California
		Pacific Gas LNG Terminal Company
		Pacific Gas Marine Company
		Pacific Gas Transmission Company

Party	Parent(s)	Subsidiaries and Affiliates
		Pacific Transmission Supply Company
		Standard Pacific Gas Line Incorporated
Pennsylvania Power & Light Company	—	The Arcadia Company, Inc.
		BDW Corporation
		Court Development Company
		Greene Hill Coal Company
		Greene Manor Coal Company
		Hanover Development Company
		Interstate Energy Company
		LCA Leasing Corporation
		The Oneida Mining Company
		Pemico, Inc.
		Pennsylvania Mines Corporation
		Realty Company of Pennsylvania
		Rushton Mining Company
		Service Development Company
		Tunnelton Mining Company
		Uranium Resources and Development Company
Philadelphia Electric Company	—	Adwin Equipment Company
		Adwin Realty Company
		Conowingo Power Company
		Eastern Pennsylvania Development Company
		Eastern Pennsylvania Exploration Company
		Philadephia Electric Power Company
		Radiation Management Corporation
		Susquehanna Electric Company
		Susquehanna Power Company
		The Proprietors of the Susquehanna Canal
Power Authority of the State of New York	—	—

Party	Parent(s)	Subsidiaries and Affiliates
Public Service Company of Indiana, Inc.	—	South Construction Company, Inc.
Rochester Gas and Electric Corporation	—	Canadea Power Corporation
Southern California Edison Company	—	Associated Southern Investment Company
		California Electric Power Company
		Calabasas Communications Co.
		Calabasas Park Co.
		Calabasas Park Co., Inc.
		Calabasas Park Country Club
		Electric Systems Company
		Energy Services, Inc.
		Mono Green Mountain Company
		Mono Power Company
		Mono Power Company (Bolivia)
		Mono Power Company (Italy)
		Mono Power Company (Maylasia)
		Mono Power Company (Nicaragua)
		Mono Power Company (Panja New Guinea)
		Mono Power Company (Peru)
		Southern Surplus Realty Company
Union Electric Company	—	Electric Energy, Inc.
		Missouri Edison Company
		Missouri Power & Light Company
		Missouri Utilities Company
		Union Colliery Company
Vermont Yankee Nuclear Power Corporation	—	Cambridge Electric Light Company
		Central Maine Power Company
		Central Vermont Public Service Company

Party	Parent(s)	Subsidiaries and Affiliates
		The Connecticut Light and Power Company
		Green Mountain Power Corp.
		The Hartford Electric Light Company
		Montaup Electric Company
		New England Power Company
		Public Service Company of New Hampshire
		Western Massachusetts Electric Company
Virginia Electric and Power Company	—	Laurel Run Mining Company
		Virginia Nuclear, Inc.

Opposition

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Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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No. 81-336

In the Supreme Court of the United States

OCTOBER TERM, 1981

CONSOLIDATED RAIL CORPORATION, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

RICHARD A. ALLEN
General Counsel

ELLEN K. SCHALL
Deputy Associate General Counsel
Interstate Commerce Commission
Washington, D.C. 20530

QUESTION PRESENTED

Whether the court of appeals, in affirming the Commission's decision that rates for the transportation of spent nuclear fuel and radioactive waste materials that were predicated on the use of special train service, which service already had been found to be a wasteful and unreasonable practice, were unjust and unreasonable, erroneously applied a more rigorous standard of proof than that to which petitioners believed they were subject during the administrative proceedings.

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a; 2b) is reported at 646 F. 2d 642. The opinion of the Interstate Commerce Commission (Pet. App. 1d-26d) is reported at 362 I.C.C. 756. An order of the Commission modifying that decision (Pet. App. 1e-4e) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1981 (Pet. App. 1a). A petition for rehearing was denied on April 3, 1981 (Pet. Apps. B and C). On June 19, 1981, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including August 31, 1981, and the petition was filed on August 20, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to 1975, railroads in the southern and western United States had on file with the Interstate Commerce Commission tariffs covering the transportation of spent nuclear fuel and other radioactive waste materials in regular train service. *Radioactive Materials, Special Train Service, Nationwide* (*Nationwide*), 359 I.C.C. 70, 71, 81 (1978).[1] Railroads in the eastern United States had no tariffs on file with the Commission for the transportation of radioactive materials (Pet. App. 5a). Rather, they handled shipments for the federal government under Section 22 of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 22,[2] offering the United States regular train service as needed. See Pet. App. 5a-6a.

In 1975, the railroad industry decided to require special train service (STS) for the transportation of radioactive materials at much higher rates than it had charged for regular train service.[3] In response, shippers of radioactive

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[1]"Spent nuclear fuel" refers to irradiated nuclear fuel assemblies or rods that have been removed from nuclear reactors after having been used to power them. Other, less radioactive wastes include "closure heads" and "core barrels," which are operational equipment used to handle spent fuel, as well as uniforms, clothing, tools and other materials that have been exposed to radiation. Petitioners have not claimed that the transportation of these other items by regular train service raises a significant safety issue (Pet. App. 3a n.3).

[2]The Interstate Commerce Act was recodified, without substantive change, as 49 U.S.C. (Supp. III) 10101 *et seq.* by the Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337 *et seq.* Section 22 of the Act was recodified at 49 U.S.C. (Supp. III) 10721.

[3]The court of appeals found (Pet. App. 6a n.7) that special train service (STS) has the following characteristics: "no freight other than spent fuel or radioactive waste is carried; spent fuel is carried within government approved casks which are placed on a flat car with a buffer car placed on either side; other radioactive wastes are shipped in containers in boxcars; the train has a caboose with personnel aboard who can observe the radioactive shipment while in transit; speed is restricted to 35 MPH; and when a special train carrying spent fuel or radioactive

materials initiated a series of proceedings before the Commission in which they sought to terminate the mandatory special train rules and to require the railroads to offer reasonable tariff rates (Pet. App. 6a).

In 1977 the Commission prepared a " 'generic' " environmental impact statement (EIS) to " 'be used by [it] in any proceeding in which the issue is the health and safety effects associated with special rather than regular train service' " (Pet. App. 27a). After extensive discussion and analysis, the EIS concluded that " 'the incremental environmental impact of special trains as opposed to regular trains is very small' " (*id.* at 25a).

In subsequent decisions, the Commission held that railroads in the South and West could neither disavow their common carrier obligation to haul nuclear wastes nor require that those materials be carried by special train service. *Nationwide, supra; Radioactive Materials, Missouri-Kan.-Tex. R.R.*, 357 I.C.C. 458 (1977). The Commission also rejected the assertion of petitioners, the Eastern railroads, that they had no common carrier obligation to haul nuclear waste traffic. *United States Energy Research & Development Administration* v. *Akron, Canton & Youngstown R.R.*, 359 I.C.C. 639 (1978), aff'd *sub nom. Akron, Canton & Youngstown R.R.* v. *ICC*, 611 F. 2d 1162

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waste is passed by another train, one of the trains remains standing while the other train passes at a speed not faster than 35 MPH."

The rate charged for special train service by the southern and western railroads was at least $18 to $20 per mile more than that charged for regular service. *Nationwide, supra*, 359 I.C.C. at 75, 86. The rates subsequently published by the eastern railroads for STS (see page 4, *infra*) amounted to 3,000% of the cost of regular service (Pet. App. 20d).

(6th Cir. 1979), cert. denied, 449 U.S. 830 (1980). Specifically, the Commission held that petitioners' refusal to file tariffs violated Sections 1(4) and 6(1) of the Act, 49 U.S.C. (1976 ed.) 1(4) and 6(1), and the National Transportation Policy preceding Section 1 of the Act, 49 U.S.C. (1976 ed.) 1.[4] Accordingly, the Commission ordered petitioners to publish "reasonable and otherwise lawful" tariffs for the carriage of nuclear waste materials. 359 I.C.C. at 641.

2. In response to the Commission's order requiring them to file reasonable tariffs, petitioners filed tariff rates predicated on the use of special train service (Pet. App. 6a). The Commission initially suspended the new rates, but in March 1979 it lifted the suspension and continued to investigate the new rates with the caveat that the carriers would be required to refund any amounts by which the rates they collected exceeded the rates finally authorized by the Commission (App., *infra*, 2a). At the outset of the investigation, the Commission put petitioners on notice that the burden of demonstrating that special train service was necessary rested on them (App., *infra*, 3a):

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[4]Section 1(4) of the Act, 49 U.S.C. (1976 ed.) 1(4), made it the duty of every rail common carrier to establish "just and reasonable rates, fares, charges, and classifications * * *." Section 1(4) was recodified at 49 U.S.C. (Supp. III) 10701(a), which provides in relevant part that "[a] rate classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable."

Section 6(1) of the Act, 49 U.S.C. (1976 ed.) 6(1), made it the duty of every rail common carrier to file tariff schedules with the Commission. The National Transportation Policy preceding Section 1 of the Act, 49 U.S.C. (1976 ed.) 1, declared that it was Congress' policy, *inter alia*, "to promote safe, adequate, economical, and efficient service." Section 6(1) of the Act and the National Transportation Policy were recodified at 49 U.S.C. (Supp. III) 10762(a)(1) and 10101(a), respectively.

> The carriers are also reminded that we found certain special handling services not shown to be necessary in Docket No. 36325, *Radioactive Materials, Special Train Service, Nationwide*. The imposition of charges for unnecessary special handling may also be subject to refund in this case.
>
> Although we agree that the suspension in this case should be lifted and the burden of proof rests with the protestants, we do not believe that protestants should have the burden of going forward in presenting evidence. The carriers[,] rather than the protestants, possess the relevant data and are in the best position to come forward first in the presentation of evidence supporting the proposed rates. Also, they are in the best position to demonstrate why special train services are necessary.

At the conclusion of its investigation, the Commission found (Pet. App. 19d) that "special train service would be for all practical purposes no safer than regular train service." All the available evidence, including the EIS, showed that "especially because of the ability of the casks [government approved, heavily shielded containers] to withstand stress, the use of special trains provides no cognizable safety benefit." The Commission therefore concluded (*ibid.*) that the special train service requirement was wasteful and unreasonable, in violation of 49 U.S.C. (Supp. III) 10701(a). Accordingly, it invalidated the tariff rates based on the special train service requirement, and prescribed a reasonable level of rates under regular train service (Pet. App. 21d).[5]

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[5]Petitioners have not challenged the rate prescription. They challenge only the Commission's finding that special train service was unnecessary.

3. On the Eastern railroads' petition for review, the court of appeals affirmed the Commission's orders, holding (Pet. App. 3a) that "the ICC acted properly in determining, on the record before it, that the use of special train service was unnecessary." Although the court stated (*id.* at 20a-22a) that the Commission would have been entitled to rely on DOT and NRC regulations as establishing a presumption that special train service was not reasonably necessary to insure safety, it noted (*id.* at 23a) that in fact the agency had not relied on any such presumption. The court therefore examined the record made before the Commission and concluded (*ibid.*) that

> sufficient evidence existed to support [the Commission's] conclusion that STS was unnecessary for safety reasons, even without the presumption against STS arising from the DOT/NRC regulations, which we believe the Commission should have taken into account.

ARGUMENT

Petitioners do not contend that the applicable NRC and DOT regulations referred to by the court of appeals do not establish a presumption that special train service is unnecessary. Rather, they seek summary reversal of the decision below because, they allege, they were "surprised" by the court of appeals' asserted reliance on that presumption. Contrary to petitioners' assertions, however, this Court's intervention is not warranted. First, the court of appeals did not invoke any presumption that special train service is unnecessary, but rather affirmed the Commission's decision on the basis of its own independent review of the evidence. Second, petitioners in any event were on notice throughout the administrative investigation that they had the burden of going forward with evidence that special train service affords some cognizable safety benefit.

1. Although the court of appeals stated (Pet. App. 17a, 20a-22a) that a presumption arises that expenditures for safety measures not required by the NRC or DOT are unnecessary, the court correctly concluded (*id.* at 23a) that the Commission had not relied on that presumption. Accordingly, the court reviewed the Commission's decision without regard to the presumption and solely on the basis of the record made before the agency (*ibid.*). Petitioners' contention that the presumption was first articulated at the appellate level is therefore irrelevant, since the court of appeals did not utilize that presumption in reviewing the agency's decision. While the court's discussion of the presumption will provide guidance for the agency in future cases, it was not the basis upon which the court of appeals affirmed the Commission's decision in this case.[6]

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[6] *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966), on which petitioners rely (Pet. 10-12) for the proposition that remand is required when new standards of proof are first articulated on appeal, therefore is inapposite.

Petitioners' reliance (Pet. 10-12) on *Morgan* v. *United States*, 304 U.S. 1 (1938), and *Willner* v. *Committee on Character*, 373 U.S. 96 (1963), also is misplaced. In *Morgan*, the court held that the petitioners in that case had not been afforded a fair hearing because there was no specific complaint to which they could respond (304 U.S. at 19), the hearing examiner issued no report or proposed findings to which they could object (*id.* at 16), and the government counsel who prosecuted the case filed no brief, but merely submitted proposed findings on an *ex parte* basis to the decisionmaker, who adopted them without giving the petitioners an opportunity to reply (*id.* at 16-17). By contrast, the scope of the investigation in the present case was clear, there were no *ex parte* contacts, and petitioners had been specifically reminded at the outset that in *Nationwide* the Commission had found that special train service provided no discernible safety benefit and that, therefore, it was incumbent on them to produce evidence demonstrating why special train service was necessary (App., *infra*, 3a). Similarly, the Court ruled in *Willner*, *supra*, that an applicant for admission to the New York State bar must be apprised of and afforded a hearing on the grounds for his rejection. Here, petitioners were afforded every opportunity, including a plenary hearing, to demonstrate the need for special train service.

2. Petitioners contend (Pet. 13-16) that they had no notice at the time of the administrative hearing that they would have to rebut the findings articulated in the EIS and *Nationwide* to the effect that special trains provide no cognizable safety benefit.[7] That claim is unfounded. At the beginning of its investigation, the Commission specifically reminded petitioners (App., *infra*, 3a) that special train service had been found to be unnecessary and that it was incumbent on petitioners to demonstrate why special train service was necessary.[8] Thereafter, during the course of its

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[7]In *Nationwide*, the Commission found (359 I.C.C. at 74):

> Though the special trains were found to be slightly safer in relation to radiation-related facilities under accident conditions, they were found to have a nonradiological impact by causeing [*sic*] added fuel consumption, increased air pollution, and additional accidents. On the whole, therefore, the special trains were not found to be safer. This conclusion appears to be well-considered, as the added safety against accidents resulting in radiation leaks is quite minimal. Additionally, the fact that this special service will cause an increase in rail traffic creates other risks.

[8]Petitioners' reliance (Pet. 5, 13) on the Commission's statement that the protestants had the burden of proof is misplaced. Although the protestants had the ultimate burden of proving that the rates were unreasonable and that petitioners had market dominance over the traffic (Pet. App. 6d), any burden the protestants had on the issue of safety benefits resulting from special train service was met by citing the Commission's decision in *Nationwide* (*id.* at 28a-29a and n.24). Thereafter, petitioners had the burden of going forward with evidence showing why the Commission should not rely on the prior holding in that case. Petitioners failed to carry that burden, just as they had failed to rebut the presumption established by protestants that the carriers had market dominance (*id.* at 8d). As the court of appeals noted (*id.* at 29a),

> [t]he Commission was entitled to rely upon its safety findings in *Nationwide*—a proceeding directly relevant to the one *sub judice*—and it was entirely proper for it to apply the expertise and knowledge it had gained in that proceeding to this case, since petitioners were given a full opportunity to contest the earlier findings with new evidence.

investigation, the Commission reviewed the safety evidence introduced by petitioners, but found that similar or identical testimony had been presented by carriers during the preparation of the EIS, and that such testimony was not convincing (Pet. App. 19d).

The court of appeals thoroughly discussed (Pet. App. 26a-29a) the reasons why petitioners could not have been surprised by the Commission's reliance on the EIS: (1) petitioners actually participated in the notice and comment proceedings that preceded issuance of the EIS; (2) the EIS itself provided actual notice that the Commission would use the EIS in future proceedings related to the environmental, health and safety effects of special train service; and (3) petitioners had ample opportunity during the administrative proceedings to contest the data contained in the EIS. As the court of appeals stated (Pet. App. 29a):

> [f]or the Commission to prepare an extensive and detailed EIS addressed to the very issue of this case and then ignore it in rendering its decision, would be both a waste of its time and resources, as well as contrary to the policies of the National Environmental Policy Act, 42 U.S.C. 4332.

In short, petitioners' failure to adduce sufficient evidence to show that special trains provide a cognizable safety benefit resulted not from lack of fair notice or opportunity to present evidence, but rather from petitioners' persistent, but unfounded, reliance on the bare assumption (Pet. 7) that "special trains * * * could not fail to enhance safety." Because the Commission expressly had found to the contrary in both *Nationwide* and the EIS, however, petitioners received unambiguous notice that the Commission would not accept their unproven assumption in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD A. ALLEN
General Counsel

ELLEN K. SCHALL
Deputy Associate General Counsel
Interstate Commerce Commission

OCTOBER 1981

DOJ-1981-10

APPENDIX

SERVICE DATE

MAR 19 1979

INTERSTATE COMMERCE COMMISSION

DECISION

INVESTIGATION AND SUSPENSION DOCKET NO. 9205 TRAINLOAD RATES ON RADIOACTIVE MATERIALS, EASTERN RAILROADS

INVESTIGATION AND SUSPENSION DOCKET NO. 9205 (SUB-NO. 1) TRAINLOAD RATES ON RADIOACTIVE MATERIALS, EASTERN RAILROADS

Decided: March 15, 1979

In its decision in Docket No. 36312,[1] U.S. *Energy Research and Development Administration* v. *The Akron, Canton and Youngstown Railroad Company*, et al., served July 5, 1978, the Commission, Division 2, found that the eastern railroads' refusal to transport spent nuclear fuel and radioactive waste materials as common carriers violated sections 1(4), 6(1) and the National Transportation Policy (now 49 U.S.C. § 11101, 10762(a)(1), and 10101, respectively). The Commission ordered these railroads to cancel their flagouts to the Uniform Freight Classification (UFC)

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[1]This decision also embraces No. 36313, *Allied General Nuclear Service, et al.* v. *The Akron, Canton, and Youngstown Railroad Company, et al.*; No. 36330, *GPU Service Corporation, et al.* v. *The Akron, Canton and Youngstown Railroad Company, et al.*; No. 36335, *Commonwealth Edison Company, et al.* v. *The Akron, Canton and Youngstown Railroad Company, et al.*; and No. 36336, *General Electric Company* v. *The Akron, Canton and Youngstown Railroad Company, et al.*

and to publish reasonable and otherwise lawful tariff schedules which are now under suspension in No. 9205. However, the railroads did not cancel their flagouts to the UFC. Instead, they published commodity column rates substantially higher than those in the UFC. These rates were suspended by a majority of the Commission.

On December 15, 1978, we ordered the eastern railroads to show cause why the flagouts in issue should not be stricken from their tariffs. On December 21, 1978, they filed a response to the show cause order. Replies were filed jointly by various protestants on December 29, 1978, and by the U.S. Department of Energy on January 2, 1979.

In a separate petition filed December 21, 1978, the eastern railroads requested that the procedural schedule served in this proceeding on December 15, 1978, be vacated and modified to require protestants to file their opening statement of facts and arguments first. In the alternative, respondents requested that the due date for filing their opening statements of facts and arguments be postponed from January 4 to January 29, 1979. Separate replies were filed by various protestants on December 29, 1978, and by the U.S. Department of Energy on January 2, 1979. The principal justification for the petition to vacate and modify is that the rates at issue are initial rates, and that the protestants have the burden of proof.

The eastern roads have apparently never participated in the UFC rates on these commodities. The rates under suspension are therefore initial rates. Under these circumstances, we believe that the protections afforded by the mandatory keep-account provisions of 49 U.S.C. 10717 should be adequate. The petition to vacate suspension is therefore granted. The investigation, on the other hand, is continued. After the investigation is completed, the carriers will be required to refund the amount, if any, by which the proposed rates collected exceeds the rates finally authorized by

the Commission. The carriers are also reminded that we found certain special handling services not shown to be necessary in Docket No. 36325, *Radioactive Materials, Special Train Service, Nationwide*. The imposition of charges for unnecessary special handling may also be subject to refund in this case.

Although we agree that the suspension in this case should be lifted and the burden of proof rests with the protestants, we do not believe that protestants should have the burden of going forward in presenting evidence. The carriers rather than the protestants, possess the relevant data and are in the best position to come forward first in the presentation of evidence supporting the proposed rates. Also, they are in the best position to demonstrate why special train services are necessary. The Commission needs the best evidence available, since it may find it necessary to prescribe a rate after considering the evidence. To ensure that the data presented will be meaningful and complete, we will waive our Rules of Practice and require that the railroads file their evidence first. We would also note that this will give the carriers the advantage of closing the record after the protestants have presented their case. Finally, we would ask all parties to address the environmental impacts, if any, that the rates at issue would have on the movement of traffic.

It is ordered:

The suspension order entered in this case is vacated, effective immediately. The investigation is continued.

Respondents are ordered to keep account of the money collected under the "interim" rates, to facilitate refund of the amount, if any, by which the interim rates collected exceed the rates finally authorized by the Commission.

Respondents are directed to file their evidence in support of the rates at issue on or before 30 days from the date of

service of this order. Protestants' evidence shall be filed 30 days thereafter with rebuttal, if any, filed by respondents within 20 days from the filing of protestants' evidence.

By the Commission, Chairman O'Neal, Vice Chairman Brown, Commissioners Stafford, Gresham, Clapp and Christian.

s/s H.G. Homme, Jr.

H. G. HOMME, Jr.
Secretary

(SEAL)

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
OCT 28 1981
ALEXANDER L. STEVAS
CLERK

No. 81-336

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CONSOLIDATED RAIL CORPORATION, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION
AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY OF PETITIONERS

HARRY N. BABCOCK
P.O. Box 6419
Cleveland, Ohio 44101
(216) 623-2200

RICHARD W. KIENLE
8 N. Jefferson St.
Roanoke, Va. 24042
(703) 981-5139

MICHAEL BOUDIN*
JENNIFER L. MACHLIN
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5286

CHARLES E. MECHEM
1138 Six Penn Center Plaza
Philadelphia, Pa. 19104
(215) 977-5017

Attorneys for Petitioners

October 1981

**Counsel of Record*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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REPLY OF PETITIONERS

1. In seeking certiorari and summary reversal, the railroads showed that the Court of Appeals in affirming the Commission's decision relied upon a newly created presumption, attributed to NRC and DOT regulations, that the special train requirement was unjustified. The lower court outlined evidence that might have been presented to rebut its new presumption but concluded that "no such rebutting evidence, however, was presented in this case." Pet. App. 20a. Since the presumption was not announced until judicial review, under *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966), the railroads were entitled to a remand to the Commission to afford them an opportunity to introduce evidence to meet the presumption. The lower court refused to order such a remand.[1]

[1] It was explicitly requested to do so by petition for rehearing which cited *Rosenblatt* and a number of other decisions reflecting the same principle.

In opposing certiorari, the Federal respondents do not deny that, if the lower court relied on such a newly created presumption, then the railroads are entitled to a remand in order to meet it. Instead, the Federal respondents assert that the lower court "did not utilize that presumption in reviewing the agency's decision." Gov. Opp. 7. The Federal respondents suggest that the Court of Appeals rested its decision solely on the ground that the record contained substantial evidence showing that special train service provides no safety benefit.[2]

The difficulty with this argument is that the lower court not only devoted 13 pages of discussion to developing and applying the presumption (Pet. App. 11a-23a), but the lower court itself said that it *did* rest upon the presumption based on NRC and DOT regulations. In concluding its opinion, the lower court stated:

> "In judging the reasonableness of the tariffs in this case, the ICC was entitled to assume that heavy additional expenditures by the railroads, allegedly for 'safety' but mandated neither by DOT or NRC, were *presumptively* unnecessary and hence unreasonable. *Since the railroads failed to present evidence sufficient to rebut that presumption,* we believe the Commission acted properly in finding on this record that STS [special train service] was unnecessary as a safety measure, and that the tariffs based on it were therefore unreasonable." Pet. App. 31a (emphasis added).

When the lower court sums up its own opinion by explicitly relying on the presumption, it is untenable to suggest that the presumption played no role in the lower court's decision. The same summary did not even advert to the supposed alternative ground on which the Federal

[2] In fact, the record contains no such evidence and the attempt to supply it *ex post facto* produces another violation of *Rosenblatt*. See pp. 3-5, below.

respondents now seek to rest the entire decision. *Rosenblatt* made clear that even the mere possibility of a different result on remand, after the burdened party is afforded a chance to meet the newly announced burden, is sufficient to require such a remand. 383 U.S. at 87-88.

2. The respondents' opposition is equally flawed, even if the affirmance is deemed to rest solely on alleged "substantial evidence" in the record to support a finding that special train service had no safety benefits. In order to adduce such "evidence," respondents have to disregard *all* of the actual evidence in the record relating to safety; and they must rely instead on assertions in an earlier, outdated EIS, coupled with a claim that the railroads had to introduce further evidence to refute those EIS assertions in this case, a burden the railroads had no idea they were required to bear. In short, respondents' supposed alternative ground for affirmance is equally a violation of the *Rosenblatt* doctrine and a further basis for certiorari in this Court.

The *only* substantial evidence on safety in this record was introduced by the railroads in support of the need for special train service. It comprised evidence from scientists, railroad operating personnel and a security expert to show specifically how the lower speeds, exclusion of other dangerous cargo, special routing and other adjuncts of special train service reduce both the likelihood and consequences of a serious accident.[3] Taking the position that safety was not involved in this case, the shipper in-

---

[3] In an attachment to this reply, each of these witnesses is identified, together with a brief statement of the subject matter of his testimony. See pp. 1a-2a, below. The merest glance at this evidence amply refutes the suggestion (Gov. Opp. 9) that the railroads relied upon a "bare assumption" that special trains had to enhance safety.

terests submitted *no* contrary safety evidence.[4] It is not surprising that the Commission's own Rail Public Counsel concluded that on this record "only one outcome is possible" and the special train tariffs would have to be sustained. RPC Mem. 8.

The railroads' asserted failure to refute statements in the EIS cannot provide a basis for affirming the Commission. While the lower court now says that the railroads were obliged to "undermine" the EIS (Pet. App. 29a), the railroads were not advised of any such obligation when the Commission proceeding was conducted.[5] Far from warning of any such burden on the railroads, the Commission — while altering the order of proof to allow the railroads to open — expressly declared twice that the "burden of proof" rested upon the shippers. Pet. App. 3d; Gov. Opp. 3a.[6]

So far as it rested its affirmance on a newly created burden of proof borne by the railroads to "undermine" the EIS, the lower court again violated the *Rosenblatt* doctrine. The imposition of such a burden by the lower court after the record had closed required that a remand be afforded to permit the railroads to meet the previously unknown burden. Given the defects in the outmoded EIS identified by the railroads (see Pet. 15), there is more

[4] The shippers took the position that the Commission had no authority to consider safety issues and that accordingly no safety evidence needed to be submitted.

[5] The Commission order specifying proof requirements (quoted Gov. Opp. 3a) did not mention the EIS. The EIS was not introduced into evidence and was scarcely even adverted to in the proceedings prior to the agency decision. The Commission did not even attempt to update the EIS.

[6] Thus, the railroads reasonably proceeded to introduce substantial evidence (see pp. 1a-2a, below) to show that special trains enhance safety; the shippers introduced no safety evidence; and the record closed.

than a mere possibility that the railroads can on remand meet the newly invented burden.

3. The conflict between the decision below and this Court's decision in *Rosenblatt* amply warrants certiorari and summary reversal in this case. *Rosenblatt* entitles the railroads to a remand in which they can seek to rebut the newly created presumption derived from agency regulations and meet the unanticipated burden of undermining the EIS. In addition to the controlling rule in *Rosenblatt*, other factors warranting review and remand deserve re-emphasis:

> — all of the evidence introduced in this proceeding relating to safety supported the proposition that special trains do reduce the danger and adverse impact of accidents involving radioactive material. R.R. Pet. 5-7.
>
> — the Commission acknowledged the railroads' long list of safety advantages of special train service — many of them obvious as a matter of common sense (*e.g.*, slower speed, controlled routing) — and then rejected special train service without even attempting to disprove a single one of the advantages. R.R. Pet. 6 n.7, 8.
>
> — there is a substantial basis for believing that if a remand is afforded, the railroads can respond to the presumption and meet the burden established by the lower court. R.R. Pet. 15.
>
> — any plausible step to increase protection of the public against the risk of an accident involving release of highly radioactive material deserves the most careful and sympathetic scrutiny before it is found to be unjustified. See R.R. Pet. 3.

After every disastrous accident someone asks why precautions were not taken in advance to reduce the risk or severity of the disaster. Here, the railroads — which unlike other American businesses are effectively com-

pelled to participate in the nation's nuclear program[1] — are attempting to take such precautions against accidents that could produce radiation damage of extraordinary magnitude. In seeking certiorari and summary reversal, the railroads ask this Court merely for a fair opportunity to prove facts which the lower court itself admits could sustain the special train requirement. Both under *Rosenblatt* and every test of common sense and fairness, the railroads are entitled to that opportunity.

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[1] Whereas an ordinary supplier of goods or services can choose whether or not to deal with radioactive material or participate in other aspects of the industry, the railroads have been ordered to provide common carrier service to transport the radioactive materials in question as a result of prior Commission directives. See R.R. Pet. at 4-5 n.5.

CONCLUSION

For the reasons stated above and in the petition, certiorari should be granted and the decision below should be summarily reversed on the authority of *Rosenblatt*. In the alternative, certiorari should be granted and the case should be set for briefing and oral argument.

Respectfully submitted,

HARRY N. BABCOCK
P.O. Box 6419
Cleveland, Ohio 44101
(216) 623-2200

RICHARD W. KIENLE
8 N. Jefferson St.
Roanoke, Va. 24042
(703) 981-5139

MICHAEL BOUDIN*
JENNIFER L. MACHLIN
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5286

CHARLES E. MECHEM
1138 Six Penn Center Plaza
Philadelphia, Pa. 19104
(215) 977-5017

Attorneys for Petitioners

October 1981

Counsel of Record

APPENDIX

ATTACHMENT

The railroads submitted verified statements in the Commission proceeding, which are related in whole or part to safety issues, by each of the individuals listed below. They are reproduced in full in Volume I of the Joint Appendix in the lower court.

Melvin O. Benson, General Superintendent of Transportation for the Chessie System lines had 36 years' experience with railroad transportation. He testified that compliance with the NRC cask requirements would provide reasonable safety up to the limits of the cask test conditions but that the railroad accident environment can be more severe than the test limits. He explained that this danger underlies the application of additional restrictions reflected in the special train requirement. J.A. 51-60.

William J. Harris, Jr., Vice President of the Association of American Railroads in charge of its Research and Test Department, is a registered professional engineer holding a Ph.D. from the Massachusetts Institute of Technology and having substantial prior engineering research experience. He testified that the cask limits could be exceeded in railroad accidents; he pointed out, for example, that the threat of fire of extended duration is always present in a railroad accident and that in a recent Government test, an empty cask developed unshielded areas in less than two hours' exposure. He also described the multiple impact from trailing cars in a multi-car accident and the possibility that a cask meeting design criteria for the initial impact would then fail after being subject to multiple impacts. He also described the history of the development of the special train requirement and the numerous safety advantages resulting from special train service, including the reduction of speed and the elimination of other dangerous materials from the shipment. J.A. 61-68.

Richard B. Hasselman, Senior Vice President of Consolidated Rail Corporation for operations, began his railroad career in 1947, held a substantial number of different operating

positions, and personally inspected numerous derailments and studied hundreds of accident reports. He described the special hazards resulting from accidents involving radioactive material and provided a detailed description of the safety benefits of special train service including special routing around population centers and high density lines, use of speed limitations, avoidance of classification yards, and opportunity to use specially qualified personnel. J.A. 69-78.

Donald L. Nelson, Chief Security Officer of Consolidated Rail Corporation, served for a number of years as a special agent of the U.S. Secret Service and had private experience in security work. He described statistics reflecting over 34,000 "incidents" reported in Conrail operations between April and November 1976, including over 3,000 cases of track obstruction and over 5,000 of vandalism (*e.g.*, tampering with signals, switches). He testified to the relationship between such criminal conduct and the need for special precautions to be taken in the handling of radioactive material. J.A. 19-25.

Gary D. Williamson, a physicist in the Research Department of Consolidated Rail Corporation, has been a physicist at Conrail for 14 years and served as its radiation protection officer. He testified that special train service should be utilized because of the lack of attention which a single car inevitably receives when it is operating as part of a typical regular freight train and because of the need for special monitoring, exclusion of other cargo creating a fire hazard, and other risks that could exceed the design limits of the casks. J.A. 26-31.